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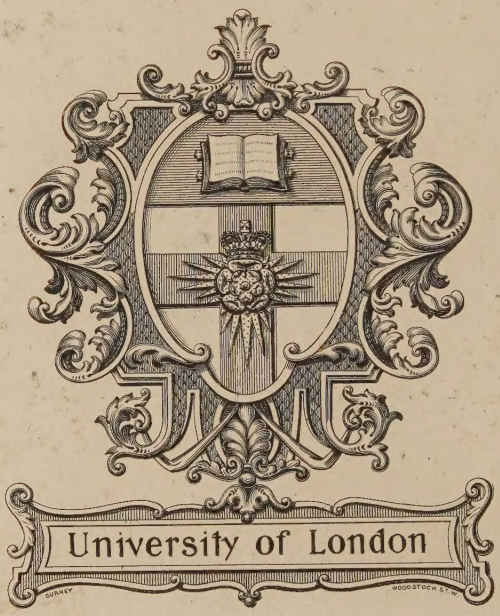

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1902.

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OF

THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE.

1902.

The Right Hon. Sir Francis Henry Jeune, Knt., President.

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OF

THE COURT OF APPEAL.

1902.

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DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

1901—1902.

In the Goods of BRASSINGTON.

1901
Nov. 4.

Probate—Practice—Will torn in pieces and pasted together again—Persons not sui juris interested in Intestacy—Probate, on Motion, to Executrix.

The Court, upon motion by the sole executrix, granted probate of a will which had been torn up and afterwards pasted together again, notwithstanding the fact that the persons interested under an intestacy were not sui juris and no guardian ad litem had been appointed by the Court to represent them.

Motion for probate of a torn will.

The testator, George Brassington, late of the Gatton Arms, 92, Tilson Street, Peckham, in the county of Surrey, died there on September 11, 1901, having duly executed his will bearing date June 8, 1899, whereof he appointed his wife, Rose Janet Brassington, sole executrix, and gave and bequeathed to her "all moneys, property, and effects" of which he was possessed "for her own disposal as she may desire."

1901

BRASSINGTON, IN THE GOODS OF.

The testator was of very intemperate habits, and when under the influence of alcohol he was extremely violent and excited, and quite incapable of understanding or appreciating what he was doing. His habits got worse towards the latter part of his life.

One night, in the early part of the year (1901), the testator, while not responsible for his actions, went to a tin box where he kept his papers, and took out therefrom his will and some other documents. The will, torn in pieces, was seen very shortly after by the testator's wife, and, on the following day, when the testator had somewhat recovered from the effects of the drinking, he, assisted by his elder son, was seen pasting the torn portions of the will on to a piece of newspaper. The testator shortly afterwards informed the doctor who was attending him that he had, during his illness and not knowing at the time what he was doing, torn up his will; that he did not know why he had torn it up; but that, when he found out what he had done, he, with the assistance of his son George, had stuck the pieces together on to a newspaper. In reply to a question by the doctor as to whether he wished the will to stand, the testator said that he did.

The estate was said to be of the net value of about 1300*l.*, and it consisted for the most part of freehold property.

Barnard, for the widow, asked the Court to allow probate on motion. One reason why a grant was required at once was that the licensing sessions would be held in two days' time.

R. H. Pritchard, for the two children, appearing by their paternal grandmother (not appointed guardian ad litem by any order), was instructed to consent.

[GORELL BARNES J. Is there any means of getting proper security in a case of this kind?]

Barnard. No; this is an application by an executrix; and, under the will, the whole property is left to her absolutely. The only cases approaching this are cases of lost wills, where, the estates being small, the Court of late has modified the practice, and has not insisted that all persons interested under

an intestacy should be sui juris and should consent to the matters being disposed of on motion. 1901

BRASSINGTON, IN THE GOODS OF

GORELL BARNES J. I will allow probate of the will.

Solicitors: *Charles Richard Taylor; Pearce & Rowse.*

H. D. G.

BROWN *v.* SKIRROW.

1901

Nov. 12, 13.

Will—Execution—"In the Presence" of Witnesses—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 9.

The expression "in the presence" in s. 9 of the Wills Act must be taken to mean actual visual presence.

Where a testatrix signed her will in a shop, and one witness, who saw her sign, attested it, but the other witness being at the time when the testatrix and first witness signed engaged at the other side of the shop with a person who stood between him and the testatrix, did not see them sign and did not know nor have the opportunity of knowing anything about what they had been engaged upon until after they had signed, when he was asked to be a witness:—

Held, that the testatrix did not sign "in the presence" of the second witness.

THE plaintiffs, as executors, propounded a will of their sister, Mrs. Harriet Ann Skirrow, dated July 20, 1900. This will was drawn by her solicitor and attested by him and his clerk.

The defendants, two infant children of the testatrix, appearing by their duly appointed guardian ad litem, pleaded revocation of that will and propounded a later will executed on April 22, 1901, but wrongly dated 1891, in which also the plaintiffs were named as executors.

In reply, the plaintiffs pleaded undue execution of the later will; and this was the sole issue contested in the case.

The husband of the deceased, who resided in Canada, had been cited, but had not appeared.

The following are the facts:—

On Monday, April 22, 1901, in the forenoon, the testatrix

1901

BROWN v. SKIBROW.

went to the shop of Mr. Sandy Read, at 225, Hyde Park Road, Leeds, grocer and wine merchant, which was near her residence. Both Mr. Read and Miss Mary Jeffery, his assistant, were in the shop, the former being engaged at the time with a commercial traveller, who was also in the shop and who stood between Mr. Read and the testatrix. The shop, which was not large, had two counters, and Mr. Read was at one counter. The testatrix went to Miss Jeffery, who was at the other counter, produced a printed form of will, which, apparently, had already been filled up, and asked Miss Jeffery to see her sign it. The testatrix signed it, and Miss Jeffery, who saw the testatrix sign, then attested it. The traveller having left shortly afterwards, Mr. Read was asked by Miss Jeffery to go round to the counter where the testatrix had signed, Miss Jeffery taking his place at the other counter. The testatrix then said to Mr. Read, "This is my will. I have signed it. Miss Jeffery has signed it. Will you sign it?" At this time Miss Jeffery was attending to a customer at the other counter, and did not see Mr. Read sign the will.

Priestley, for the defendants, asked the Court to find that this document was duly executed.

Middleton, for the plaintiffs, contra. One of the latest cases as to the meaning of the word "presence" in s. 9 of the Wills Act (1) is *Carter* v. *Seaton*. (2) There must be, on the part of a testator or testatrix, capacity to see the witnesses sign—that is, actual visual capacity.

The facts in the present case are very like those proved in *Wyatt* v. *Berry*. (3) The decision of Sir H. Jenner Fust in *Moore* v. *King* (4) is also strongly in favour of the plaintiffs in the present case. *Smith* v. *Smith* (5) is in point as to seeing the act of writing being necessary. *In the Goods of Kellick* (6) is an authority that "presence" means that the witnesses must see the testator sign, because that is the ground upon which the Court rejected the codicil. Mr. Read, one of the

(1) 1 Vict. c. 26.
(2) (1901) 17 Times L. R. 671.
(3) [1893] P. 5.
(4) (1842) 3 Curt. 243.
(5) (1866) L. R. 1 P. & M. 143.
(6) (1864) 34 L. J. (P. & M.) 2.

witnesses in the present case, not having seen, nor endeavoured to see, the testatrix sign the paper, was not "present."

[GORELL BARNES J. Can a blind person witness a will?]

That is a very different thing: a blind person might be quite close and might be told by the testator or testatrix that the document which was signed was a will, and, after such an acknowledgment, might attest it. In the present case no effort was made to enable the witness to see the signing of the will. Apart from the first point that "presence" must mean visual presence, there was, on the evidence, an interval of five minutes between the attestation by one witness and the attestation by the other, and, moreover, a space of ten feet with two human bodies interposed. These facts bring this case within *Wyatt* v. *Berry* (1) and *Hindmarsh* v. *Charlton* (2), and the decisions in those and similar cases therefore apply.

[GORELL BARNES J. *Hindmarsh* v. *Charlton* (2) was a case of non-acknowledgment in the presence of the two witnesses.]

The Wills Act says "present at the same time."

[GORELL BARNES J. All that it requires is that they should be present: not that they must both put their names to the document while they are there. I suppose one witness might sign, and then the other might sign afterwards.]

Priestley, for the defendants. The only element that may be said to be wanting in this case is that Mr. Read's attention was not drawn to the fact that the testatrix was going to sign the will. The strongest case in the defendants' favour is *Newton* v. *Clarke*. (3) The word "present" occurs in the Statute of Frauds (29 Car. 2, c. 3), s. 5.

[GORELL BARNES J. You cannot be a witness to an act that you are unconscious of; otherwise the thing might be done in a ball-room 100 feet long and with a number of people in the intervening space. In my view, at the end of the transaction, the witness should be able to say with truth, "I know that this testator or testatrix has signed this document."]

(1) [1893] P. 5.

(2) (1861) 8 H. L. C. 160.

(3) (1839) 2 Curt. 320.

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It is not necessary that the witness should have his attention drawn to what the testator is doing or should think about it. Mr. Read said he was conscious that the testatrix was present in the shop, and knew that she was doing something.

[GORELL BARNES J. He had not the slightest idea of what was going on at the other counter.]

The judge in *Newton* v. *Clarke* (1) goes on to refer to *Casson* v. *Dade* (2), where the doctrine of constructive presence was carried to its greatest length. There is no suggestion of acknowledgment in the present case: clearly there was no acknowledgment. The witnesses need not attest in the presence of each other: *Cooper* v. *Bockett* (3)

GORELL BARNES J. The question in this case is which of these two wills is to stand. There is no doubt, from the evidence, that the first will, dated July 20, 1900, was duly executed and attested. The second will is dated April 22, 1891; but this is clearly a mistake for 1901. If it is a good will, it revokes the former one, though not in express terms. The sole question is, Was the second will validly executed?

It appears that the testatrix prepared the second will herself and then took it to a shop, a photograph of which was produced with a variety of groceries and other things shewn therein, and in particular two counters, one on the left and the other on the right hand side of the shop. The two witnesses, or people exceedingly like them, are shewn standing behind the respective counters. The testatrix appears to have proceeded straight to the left-hand counter, where Miss Jeffery was, and asked her to witness her will. She stood with her back towards the other counter, and behind her was a commercial traveller doing business with Mr. Read, the other witness in the case. It appears, as far as I understand the evidence, that the testatrix signed her name at the left-hand counter, over which Miss Jeffery was leaning, and then Miss Jeffery signed her name as it appears on the document. Up to this time Mr. Read had been engrossed with the commercial

(1) 2 Curt. 320. (2) (1781) 1 Bro. C. C. 99.
(3) (1846) 4 No. Ca. 685.

traveller, and had not the slightest idea of what was going on at the other counter. It is urged that, even if he were conscious that the testatrix was there, he did not see anything of the transaction at the other counter; he says so himself. In fact, he did not know, and had no opportunity of knowing, what was going on there. The witness, Miss Jeffery, having completed her signature, marched round the shop and asked Mr. Read to come from his counter and go round to where the testatrix still was, Miss Jeffery taking up the position which Mr. Read vacated. Mr. Read accordingly went round, and the testatrix said to him, "This is my will." Mr. Read then signed his name to the document. The question for me to determine is whether that was a good execution and attestation. It is not suggested that it was a good acknowledgment in the presence of the two witnesses, because, at the moment when she said to Mr. Read "This is my will," the first witness, Miss Jeffery, had already signed her name; and, according to the decided cases, the acknowledgment must be made in the presence of the two witnesses, who must afterwards attest it: see especially *Wyatt* v. *Berry*. (1) Mr. Priestley, however, contends that it was a good execution; but I fail to see how the testatrix's signature can be said to have been affixed to the document in the presence of Mr. Read, when, although he was in the shop, he had no idea and saw nothing of what was going on at the time, and, moreover, had no opportunity of seeing, there being, as I have said, another person in the shop between him and the testatrix. In some cases it would be most unfortunate that such a result should arise; but, happily, in the present instance it is not very serious, because the earlier will is very much to the same effect as the later one. The Wills Act is very precise, and must be applied with strictness. I have long held the view that it would be a good thing if wills were required to be signed in the presence of some public official who should be able to see that they are properly executed. In the present state of things, I must hold that the later will is invalid, and I therefore pronounce against it. I grant probate of the earlier will,

(1) [1893] P. 5.

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and I direct that the costs of both parties be paid out of the estate.

Solicitors for plaintiffs: *Chester & Co., for Craven & Clegg, Leeds.*

Solicitors for defendants: *Budd, Johnsons & Jecks.*

H. D. G.

1901
Nov. 19.

BILBY *v.* BILBY AND HARROP.

Divorce—Practice—Costs—Co-respondent.

Where, upon an application to make a co-respondent liable for the costs of a petition, the only proof of scienter was an admission by him that within a fortnight after he first committed adultery with the respondent he became aware that she was a married woman :—

Held, that the petitioner was entitled to an order for costs against the co-respondent.

THE petition of the husband for dissolution of marriage alleged that the respondent had frequently committed adultery with Thomas Harrop, the co-respondent; and that between May 20, 1901, and June 10, 1901, at an address stated, the respondent and co-respondent on divers occasions committed adultery.

It appeared that the respondent left her husband about the end of 1891 or beginning of 1892; that she called on him in 1899; and that subsequently he saw the co-respondent, who admitted adultery, but said that at the time when the guilty intimacy commenced he did not know that the respondent was a married woman.

The co-respondent made a similar statement to the petitioner's solicitor, adding that he first became aware a fortnight after he "took up" with her that she was married.

The suit was undefended. The co-respondent appeared to the citation, but filed no answer.

Barnard, for the petitioner, asked that the co-respondent should be condemned in costs.

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Le Bas, for the co-respondent, opposed. The evidence of the petitioner and of his solicitor, which is the only evidence before the Court on the point, shews that the co-respondent was not aware, at the time when he first did wrong, that the respondent was a married woman. When he first knew of the fact, the harm was done. The practice, as laid down years ago, is not to condemn him in costs under these circumstances.

JEUNE P. The rule laid down by my predecessors is fair and proper enough, that where a co-respondent has found out, when too late to repair the wrong done, that the woman with whom he has taken up is a married woman, he ought not, because he does not then desert her, to be held liable for costs. But when the co-respondent in the present case said that he knew a fortnight after the first act of adultery was committed with the respondent that she was a married woman, I am inclined to construe that not too literally, and to hold that he practically knew from the first. In pronouncing a decree nisi, I therefore order that the co-respondent pay the costs of and incidental to the petition.

Solicitor for petitioner: *T. R. Apps.*
Solicitor for co-respondent: *Alfred Pitts.*

H. D. G.

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Nov. 20, 21, 22, 23.

THE BRISTOL CITY.

Admiralty—Compulsory Pilotage—Pilotage Certificate of Master—"Owner"—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 599.

A certificate issued, and annually renewed, by a pilotage authority, under ss. 340, 341 of the Merchant Shipping Act, 1854 (now embodied in s. 599 of the Merchant Shipping Act, 1894), recited that (name) was master of the ship (named) "whereof (name of firm) are the owners," and stated that it was granted "to enable him to pilot the said ship or any other ship or ships belonging to the same owners."

The named firm never owned the named ship, or the ship to which the master was subsequently transferred, though the firm managed both ships as belonging to the same line of ocean steamers. Individual members of the named firm held shares, along with other parties, in the named ship, and one of those members was registered as managing owner of the named ship, and of the ship to which the master was transferred, of which latter ship that member was registered as holder of all the shares, though in fact he was only trustee for beneficial owners:—

Held, by Sir F. H. Jeune P., that the certificate was invalid by reason of a mis-statement as to the ownership, for it only enabled the holder to pilot the named ship, or any other ship belonging to the same owners—that is, the named firm; but the named firm were not owners of the named ship at the date of the original issue of the certificate, or of either vessel at the date of its last renewal, or at the date of a collision between the ship to which the master was transferred and the plaintiffs' vessel.

Semble, that to satisfy the words "the ship of which he is master or mate, or any one or more ships belonging to the same owner as that ship" in s. 599 of the Merchant Shipping Act, 1894, the same owners must, at the material times, have held the whole of the shares in the vessel in respect of which the certificate was originally granted as well as hold the whole of the shares in the vessel to which the master is transferred.

The Earl of Auckland, (1861) Lush. 164, 387, followed.

Action of Damage by Collision.

The plaintiffs were the Bristol Screw Towing Company, Limited, owners of the *Peri*. The defendants were the owners of the *Bristol City*.

The question turned on the alleged invalidity of a pilotage certificate held by the master of the *Bristol City*, and granted under ss. 340, 341 of the Merchant Shipping Act, 1854,

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now embodied in s. 599 of the Merchant Shipping Act, 1894. (1)

The facts were shortly as follows:—

On March 26, 1901, a collision occurred at the bend known as Hung Road, in the river Avon, between the steam-tug *Peri* coming up, and the steam vessel *Bristol City* proceeding down the river, bound in ballast for Cardiff to load coals for St. Vincent. The *Peri* sustained considerable damage, and her owners commenced the present action against the owners of the *Bristol City*, to which the latter by their defence pleaded in the alternative that "if the said collision was caused or contributed to by any negligence in the navigation of the *Bristol City*, which is denied, the said vessel was at that time within a district in which pilotage was compulsory by law, and was by compulsion of law in charge of a duly licensed Bristol pilot, whose orders the defendants were bound to obey and did obey, and the said negligence, if any, was his alone."

Nov. 20. The action was tried by Sir F. H. Jeune P., assisted by two of the Elder Brethren of the Trinity House,

(1) 57 & 58 Vict. c. 60, s. 599: "(1.) A pilotage authority may, if they think fit, on the application of the master or mate of any ship, and on payment by him of the usual expenses, examine him as to his capacity to pilot the ship of which he is master or mate, or any one or more ships belonging to the same owner as that ship, within any part of the district of the pilotage authority.

"(2.) A pilotage authority, if on examination they find that any master or mate is competent, shall grant him a certificate (in this Act referred to as a pilotage certificate), specifying—

"(*a*) The name of the person to whom it is granted:

"(*b*) The ship or ships in respect of which it is granted:

"(*c*) The limits within which the master or mate is entitled to pilot the ship or ships: and

"(*d*) The date on which it is granted.

"(3.) The person to whom a pilotage certificate is granted shall, while he is acting as master or mate of any of the ships specified in the certificate, be entitled to pilot that ship within the limits specified in the certificate, without incurring any penalty for not employing a qualified pilot.

"(4.) A pilotage certificate so granted shall not be in force for more than the period of one year from its date, but may be renewed from year to year by an indorsement under the hand of the secretary or other proper officer of the pilotage authority who have granted the certificate."

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and resulted in a decree of both vessels being to blame; but in respect of the *Bristol City* the fault was that of the pilot alone. The question of the pilotage being compulsory was reserved.

It was admitted that the collision happened within a district in which pilotage was compulsory on the *Bristol City*, and that she had on board, at the time, a duly licensed pilot; but the master of the *Bristol City* was in possession of a pilotage certificate annually renewed by indorsement and originally dated December 8, 1891. This certificate, so far as material, was in the following terms:—

"Whereas Alfred Sendall, master of the ship *Jersey City*, registered at the port of Bristol, whereof Messrs. Charles Hill & Sons are the owners, has applied to the mayor, aldermen and burgesses of the city of Bristol, being a pilotage authority within the meaning of the Merchant Shipping Act, 1854, to be examined as to his capacity to pilot the said ship or any one or more ships belonging to the same owners within the district over which the said pilotage authority has jurisdiction. And whereas the said Alfred Sendall has thereupon been examined, and having been found competent, the said pilotage authority Do by virtue and in pursuance of the provisions of the said Act, and of all other powers thereunto them enabling, grant the said Alfred Sendall this pilotage certificate to enable him to pilot the said ship or any other ship or ships belonging to the same owners of which he shall be acting as master or mate, at the time, within the district over which the said pilotage authority has jurisdiction, without incurring any penalties for the non-employment of a qualified pilot."

From the evidence it appeared that the *Jersey City* and the *Bristol City* are both vessels belonging to the Bristol City Line, which is managed by Charles Hill & Sons; but at the date of the original issue of the certificate the name of Charles Gathorne Hill, a member of the firm of Charles Hill & Sons, appeared on the register of the *Jersey City* as the holder of three (at the time of the collision of twenty-three) shares, and managing owner, whilst other individual members of the firm held certain shares, and the remainder of the sixty-four shares

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were held by other parties. In 1899 the *Bristol City* was built, and the master of the *Jersey City* transferred to that vessel. At the date of the last renewal of the certificate, and at the time of the collision, the name of Charles Gathorne Hill appeared on the register of the *Bristol City* as managing owner and holder of the whole of the sixty-four shares; but, in fact, he was only trustee for beneficial owners.

Nov. 21, 22. *Aspinall, K.C.*, and *Dawson Miller*, for the plaintiffs, the owners of the *Peri*. The plea of compulsory pilotage is bad, for, at the time of the collision, the master of the *Bristol City* held a certificate entitling him to pilot that vessel within the Bristol pilotage district without incurring any penalties for the non-employment of a qualified pilot. The *Bristol City* was, therefore, an exempt ship, and under the decree of both to blame her owners are liable to pay a moiety of the damage sustained by the *Peri*.

Laing, K.C., and *Lauriston Batten*, for the defendants, the owners of the *Bristol City*. The plea of compulsory pilotage is good, for the certificate held by the master was invalid by reason of a mis-statement as to the ownership of the vessel: *The Earl of Auckland*. (1) At the date of the original issue Charles Hill & Sons were not the owners of the *Jersey City*. The certificate was therefore void ab initio, and as such incapable of renewal; but, assuming it to be otherwise, and that the date of the last renewal is material, then, as at that time Charles Hill & Sons did not own the *Jersey City*, and at the time of the collision did not own the *Bristol City*, her master would not be piloting a ship, as required by s. 599 of the Merchant Shipping Act, 1894, "belonging to the same owner as *that* ship," namely, the *Jersey City*.

The result is that the *Bristol City* was not an exempt ship so as to enable her master to dispense with the services of a licensed pilot, and her owners are, under s. 633, protected from liability, as the pilot who was in charge by compulsion of law has been found, so far as the *Bristol City* is concerned, alone to blame.

(1) Lush. 164, 387.

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Aspinall, K.C., in reply. In *The Earl of Auckland* (1) Dr. Lushington in his judgment said that it was "really unnecessary for the decision of the case to consider the certificate at all," and he, in fact, decided it on other grounds; but, assuming the case to be binding, the wording of the certificate in that case was different, for there the certificate granted to the master authorized him "to pilot any ship being the property of William Henry Carey of London." This was a mis-statement in the operative part; but in the present case the name of Charles Hill & Sons only occurs in the recital, and is therefore merely descriptive, so that the terms of the Act of Parliament will be satisfied if the *Bristol City* belonged to the same owner as the *Jersey City*; and this she did, for, taking the last renewal of the certificate as the material time, Charles Gathorne Hill was then registered as the managing owner of both vessels, whilst holding shares in the *Jersey City*, and being the holder of the whole of the shares in the *Bristol City*. If it were necessary that all the owners of both vessels should be the same at the date of the original issue, at the date of the last renewal, and at the date of the collision, no pilotage certificate would be valid, as changes in the ownership of some of the shares in a ship necessarily occur from time to time.

Nov. 23. THE PRESIDENT (SIR F. H. JEUNE). I think there can be no doubt that if this certificate had been a good one it would have had the effect of exempting the *Bristol City*, so that the pilot on board would not be a pilot taken by compulsion of law, and therefore her owners would not be able to plead compulsory pilotage; but, after hearing the arguments and having the facts now before me, I have come to the conclusion that this certificate cannot be considered a good certificate for that purpose.

The first objection taken was that there is a mis-statement on the face of the certificate as to the ownership—at the time of the original issue of the certificate—of the *Jersey City*. That occurs in the preliminary statement. It is there recited

(1) Lush. 164.

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that "Alfred Sendall, master of the ship *Jersey City*, whereof Charles Hill & Sons are the owners." Now, Charles Hill & Sons were not the owners; and the question is what effect did that have on the certificate. The case of *The Earl of Auckland* (1) does not appear to me to be conclusive on that matter, because, as was pointed out by counsel for the plaintiffs in that case, the mis-statement occurred in the actual material body of the certificate. The certificate there was a certificate given to a man as master of a ship of which somebody was stated to be the owner, and that was an obvious mis-statement in the material part of the certificate. This case is not exactly the same. In this case there is a mis-statement merely in the preliminary statement of the ownership of the *Jersey City* at that time; but when the future effect of the certificate is considered, I am inclined to think that a matter arises on that mis-statement which may well be considered to render the certificate bad, because it is not a certificate only in favour of Mr. Sendall whilst master of the *Jersey City*, but it is in his favour while he commands any ship of the same owners as the *Jersey City*. The words are, "to enable him to pilot the said ship or any other ship or ships belonging to the same owners." I can only read that certificate in one way, and that is that it is a certificate in favour of him while he commands the *Jersey City* or any other ship belonging to the same owners—that is to say, Messrs. Charles Hill & Sons. I do not think it is possible to read the certificate without understanding that "same owners" means the owners mentioned above, and nobody else. Therefore it is a certificate enabling him to pilot the *Jersey City*, owned by Messrs. Charles Hill & Sons, and any other vessel owned by Charles Hill & Sons; and if Charles Hill & Sons were not the owners of the *Jersey City*, then it follows that, supposing Mr. Sendall was transferred to another vessel, if that other vessel was not owned by Messrs. Charles Hill & Sons, then it could not be in accordance with the terms of the certificate; but, on the other hand, if it was owned by them, then it would be in violation of the Act of Parliament, because

(1) Lush. 164.

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it would not be owned by the same persons as owned the *Jersey City*. Therefore, I think it is impossible to sustain the certificate.

There is, however, a further ground, which to my mind is absolutely conclusive, and that is that in point of fact the *Bristol City* was not owned by the same owners as the *Jersey City* at any material time. The question may well be raised which is the material time as to the ownership of the *Jersey City*. Is it the time of the original issue of the certificate, or the time of the last renewal, or the time of the collision? One of those three times must be taken; and counsel for the plaintiffs contended, and with considerable force, that the time of the last renewal of the certificate is to be looked at because the certificate expires at the end of the year unless renewed, and, if renewed, it is not a new certificate, but a renewal of the old. I think, perhaps, I ought to look at the ownership of the *Jersey City* at the time of the renewal; if not, then at the time of the original granting of the certificate; but put either way, this certificate cannot be considered good, because the owners of the *Bristol City* were not, either on December 8, 1891, or at the time of the last renewal, owners of the *Jersey City*.

I may add that it appears to me there are great difficulties connected with these certificates, because, as vessels are owned in sixty-fourths, and some of the owners of these shares may, nay, must, continually change, it is very difficult to suppose it could have been intended that a single change in the ownership of one sixty-fourth should render the renewal of the certificate practically useless. With that, however, I have nothing to do. When the Act of Parliament was passed, I have no doubt it was contemplated that ships would be owned by companies or partnerships, of a comparatively small number of persons, and it may have been supposed that a fleet of ships would go on being owned by the same persons; but the law does not leave me any option, for I am bound to say that if the Act of Parliament talks of owners, that word must be taken in its ordinary sense, so that there cannot be the same owners unless all the sixty-fourths belong to the same persons, and the

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change of the ownership of one sixty-fourth is a change of ownership of the ship.

The result is that I hold the certificate bad, and therefore the *Bristol City* was at the time of the collision by compulsion of law in charge of a qualified pilot. I have already found that, so far as that vessel is concerned, the pilot is alone to blame; but, as the defence of compulsory pilotage was only an alternative plea, I follow the usual course, and dismiss the plaintiffs' suit without costs.

Solicitors for plaintiffs, the owners of the *Peri: Downing, Bolam & Co.*

Solicitors for defendants, the owners of the *Bristol City: Ince, Colt & Ince, for Osborne, Ward, Vassall & Co., Bristol.*

T. L. M.

THE ACANTHUS.

1901

Dec. 9.

Admiralty—Collision—Ship Docked for Repair of Damage—Owners' Improvements effected while in Dock—Apportionment of Dock Charges and Expenses—Contribution.

In order to repair the damage sustained in a collision for which the defendants were liable, the plaintiffs' vessel was dry-docked, and the plaintiffs (without causing delay or increase of dock expenses) took advantage of the opportunity to fit her with bilge keels:—

Held, by Sir F. H. Jeune P., applying the principle laid down in *The Ruabon*, [1900] A. C. 6, that, even though the plaintiffs had derived material benefit, the defendant wrong-doers were not entitled to any contribution from them towards the expenses of, and consequent upon, the dry-docking.

MOTION in objection to the report of the registrar.

The defendants were the owners of the *Acanthus*.

The plaintiffs were the owners of the *Bohemian*.

The case raised the question whether, where a vessel has to be dry-docked for collision repairs, the wrong-doer is entitled to contribution towards the expenses, on the ground that advantage has been taken by the owners of the damaged vessel to effect improvements in her.

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The facts were shortly as follows:—

On April 30, 1901, a collision occurred in the river Mersey between the steam vessel *Bohemian*, belonging to the plaintiffs, and the steam vessel *Acanthus*, owned by the defendants.

To repair certain stem damage sustained by the *Bohemian*, for which the defendants admitted liability, that vessel was on May 7 placed in dry dock, and between that date and May 16, when the repairs were completed, her owners had bilge keels fitted. By consent the assessment of the amount of the damage payable by the defendants was referred to the registrar assisted by merchants.

The total amount claimed by the plaintiffs amounted to 1960*l.* 6*s.* 8*d.*; but the learned registrar found that they were only entitled to 1461*l.* 8*s.* 2*d.*, this sum being arrived at by reducing certain items, as appears from the following extract from his report dated November 4:—

"The bill for repairing the collision damage was not disputed, but objection was taken to the dock dues and other charges connected with dry-docking the vessel, on the ground that if there had been no collision the vessel would still have been put into dry dock for her bilge keels. As to this, the oral evidence of the plaintiffs' witnesses was not easy to reconcile with the correspondence produced, which shewed that, before the collision took place, a deposit of 5*l.* had been paid to secure the option of using the dock, if required, and that on the day of the collision, and before it was known to have occurred, the plaintiffs obtained an estimate of the cost of the bilge keels. On the whole, however, we came to the conclusion that the plaintiffs had not, before the collision, been absolutely committed to doing the bilge-keel work at that time, and that justice would be done by apportioning the expenses consequent on dry-docking the vessel, as well as the loss sustained through her detention between the bilge-keel work and the collision repairs.

"Apparently there was not much difference between the cost of the two classes of repairs, and the time required for executing them."

By the schedule annexed to the report it appeared that the material items reduced were:—

	Claimed.	Allowed.
Item 4. Scraping bottom and painting with composition . . .	£75 0 0	37 10 0
„ 5. Graving dock dues .	117 0 0	58 10 0
„ 6. Paint, oil, &c. . .	8 7 7	6 2 8
„ 7. Tar, yarn, and oakum, &c.	1 11 1	
„ 8. Graving dock caps, wedges, &c. . .	2 6 7	
„ 10. Labour bill . .	94 1 3	50 0 0
„ 18. Demurrage . . .	762 0 6	455 0 0

By their notice of motion the plaintiffs applied for an order that the report of the registrar, as to the damages sustained by the plaintiffs, should be varied by allowing to the plaintiffs in full the claims numbered 4, 5, 6, 7, 8, 10, and 18 in the schedule.

Aspinall, K.C., and *Glynn*, for the appellants (plaintiffs), the owners of the *Bohemian*. The learned registrar has proceeded upon a wrong principle in finding that, although it was not the plaintiffs' intention to do the bilge-keel work at this time if it had not been for the collision, still "justice would be done by apportioning the expenses consequent on dry-docking the *Bohemian*, as well as the loss sustained by her detention, between the bilge-keel work and the collision repairs."

It is submitted that the principle laid down in *The Ruabon* (1), in the case of repairs for which an underwriter is liable, applies to repairs due to a collision for which a wrong-doer is liable, and therefore in this case the defendants cannot look to the plaintiffs for contribution to the expenses of the collision repairs, even though the plaintiffs may, without any delay or increase of expense, by executing the bilge-keel work during the time the *Bohemian* was detained in dry dock in consequence of the collision repairs, have derived some benefit.

(1) [1900] A. C. 6.

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As pointed out by the Earl of Halsbury L.C. in that case, no Court has a right to enforce what may seem to it to be just apart from common law or statute, and n the same judgment the Lord Chancellor refers to the want of authority for any such proposition as that a duty to contribute arises "on some general principle of justice, that a man ought not to get an advantage unless he pays for it." In *The Alfred* (1) Dr. Lushington said: "I apprehend that almost in every case of collision, the owners of the damaged vessel avail themselves of the opportunity of doing other repairs, which may then be effected at less expense to themselves, and if they simply avail themselves of that opportunity, without injury to the persons who pay for the repairs consequent on the collision, no exception can with propriety be taken against them for so doing." In the case of *The Rieher* (2), where it was necessary to place a vessel on a slip to execute collision repairs, the registrar allowed the slip dues, notwithstanding the fact that the owners had embraced the opportunity to paint the ship's bottom, that operation not being rendered necessary by the collision. (3)

Scrutton, K.C., and *Alexander D. Bateson*, for the respondents (defendants), the owners of the *Acanthus*. The registrar was right in apportioning the expenses, for the plaintiffs had work done to their vessel necessary to make her ready for sea, and, for that purpose, had engaged the dry dock a month beforehand. They had also invited tenders for the fitting of the bilge keels, and though there was no binding contract there was the practical intention, as a matter of business, of having it done, and, therefore, the vessel went into and stayed in the dry dock for the two purposes of the collision repairs and fitting the bilge keels. This distinguishes the case from *The Ruabon* (4), where nothing was done by the owners to their vessel except having her surveyed. Lord Brampton in his

(1) (1850) 3 Wm. Rob. 232, at p. 239.

(2) (1883) 2 Pritch. Dig. 1746, note No. 158.

(3) See also *H.M.S. Inflexible*, (1857) Swa. 200, where it was held that an outlay, merely probable, but discretionary had there been no collision, cannot be deducted from a charge made indispensable by the collision.—REPORTER'S NOTE.

(4) [1900] A. C. 6.

judgment, concurred in by Lord Davey, says (1) on this point that contribution can be insisted upon "where work is done to the vessel itself, by two or more persons, each separately and simultaneously engaged under different obligations in doing portions of it, dry-docking being necessary for each." This is substantially the same view as that expressed by Lord Blackburn in the *Vancouver* case (*Marine Insurance Co.* v. *China Transpacific Steamship Co.*). (2) He says: "The whole, both what concerns the shipowners and what concerns the underwriters, has to be repaired. It is best and most cheaply done by doing them both together, for whom it may concern, in the dry dock at the same time; and that being so, each of the parties concerned gets his work done more cheaply because it is done wholesale. Neither is entitled to take the whole benefit of the reduction of cost and apply it to his own work exclusively"; and in *The Ruabon* (3) case the Earl of Halsbury L.C., referring to the *Vancouver Case* (4), says: "The Court held that the dock dues were part of the cost, and that, under the circumstances, as the operations were simultaneously performed, the cost should be attributed in moieties to the operations of those two persons interested."

[The case of *The Normandy* [O. No. 2720.], August 8, 1900, was referred to.]

Aspinall, K.C., in reply. The distinction drawn by Lord Brampton in his judgment in *The Ruabon* (5) has reference to "two operations essentially necessary to be performed upon the hull of the ship in order to render her in a condition to justify a prudent owner in sending her again to sea." That is not the case here, as the bilge keels were not necessary to render the vessel seaworthy; but, as she had to be dry-docked for the repairs due to the collision, the owners availed themselves of the opportunity to fit them. The decision in the *Vancouver Case* (4) does not help the defendants, for, as pointed out by Lord Macnaghten in *The Ruabon* (5), the sole question there was "whether a particular average loss sustained

(1) [1900] A. C. 6, at p. 17.
(2) (1886) 11 App. Cas. 573, at p. 594.
(3) [1900] A. C. 6.
(4) 11 App. Cas. 573.
(5) [1900] A. C. 6, at p. 16.

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by the respondents exceeded 3 per cent. within the meaning of the warranty contained in a policy of assurance underwritten by the appellants."

THE PRESIDENT (SIR F. H. JEUNE). In this case, after the collision there is no doubt that it became necessary to repair the vessel, and there is no doubt, also, that the owner was justified in putting the ship into dock and repairing her at the expense of the defendants. While she was in dry dock he took advantage of the occasion to add what is called a luxury—a correct enough expression, in the sense that it was not necessary for the repair of the vessel. He took occasion to add bilge keels, which could not be done without putting the vessel into dry dock. The owner had thought before the collision of fitting the bilge keels when occasion occurred, but I think the result of the evidence is that he was under no contract to do so, and had not retained the dock for that purpose. Therefore the state of things was that he had it in his mind to put these things in when occasion arose; but it is a mistake to say that he was under any obligation to do so, either as regards a contract towards any one else, or as regards his duty towards the ship.

It therefore comes to be a simple case of the owner taking advantage of the vessel being in dry dock to add these bilge keels. That appears to me to bring the case within the principle laid down by the Lord Chancellor in the *Ruabon Steamship Company Case*. (1) The judgment of the Lord Chancellor puts the matter in the broadest possible way, in the passage quoted by counsel for the plaintiffs. It comes to this, that a person is not bound to contribute unless there is some legal obligation on him to do so. The mere fact that he gets an advantage from the opportunity which he has taken, although it may give rise in some persons' minds to those vague ideas, which are sometimes invoked, of justice or good sense imposing a duty of payment, is, the Lord Chancellor points out, not sufficient to impose a legal obligation. The Lord Chancellor, in putting it in these words, appears to me to lay down

(1) [1900] A. C. 6.

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the principle in the broadest way. He says: "This is the first time in which it has been sought to advance that principle where there is nothing in common between the two persons, except that one person has taken advantage of something that another person has done, there being no contract between them, there being no obligation by which each of them is bound, and the duty to contribute is alleged to arise only on some general principle of justice, that a man ought not to get an advantage unless he pays for it." The Lord Chancellor gives illustrations to shew that that is not founded upon any principle recognised by the English law. Comment has been made upon the decisions given by Lord Davey and by Lord Brampton in that particular case. The *Vancouver Case* (1) referred to has no bearing upon this case, because the sole question to be decided there was whether a particular average loss sustained by the respondent exceeded 3 per cent. within the meaning of the warranty contained in a policy of assurance. There was no question there of a man taking advantage of an opportunity afforded by somebody else to benefit himself. It was really a different question altogether; but I quite agree that there are expressions in Lord Davey's judgment, assuming it to be the same as Lord Brampton's, which seem to go a little further. But it appears to me to come only to this, that where there is an obligation, or where the case arises that the vessel has to be repaired—that is to say, where there are two things necessary to be done, one by one person and one by another, if they are done at one time then the cost, so far as it is common to both, may well be shared between them. But the point is that the two things are obligatory by reason of contract or duty. I can easily understand that if it had been shewn in this case that the bilge keels were a necessity, and that the vessel could not go to sea without them, it might be said that the owner was under an obligation to make that particular repair, and if he had been under an obligation, and if at that time he had put the vessel into dry dock, it might be said it was as much on his own behalf as on behalf of the defendants. But that was not so in this case. As I have said, there was no obligation on the

(1) 11 App. Cas. 573.

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shipowner at all, and the learned registrar and merchants have found in terms that he was under no obligation—that "he had not been absolutely committed to doing the bilge-keel work at that time," which means that he had not made any contract which compelled him to do it.

In these circumstances it seems to me to be the simple case of a man, being under no obligation to do a particular work, who takes advantage of an opportunity to do it. It appears to me to be practically a case to be decided on the principle laid down by Lord Halsbury in the *Ruabon Steamship Company Case* (1), and quite a different case from *The Vancouver* (2), nor does it come within the principle laid down by Lord Brampton and Lord Macnaghten of common obligation.

I see no reason, therefore, why the principle of the *Ruabon Steamship Company Case* (1) should not be applied, and why the owner of the *Bohemian* was not entitled to take advantage of the opportunity afforded by the ship being in dry dock, to make the improvement of bilge keels. The best course will be to allow the matter to go back to the registrar, to make an alteration of the figures so far as it is necessary to alter them. The appeal must be allowed with costs.

Solicitors for plaintiffs: *Rowcliffes, Rawle & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for defendants: *Thomas Cooper & Co.*

(1) [1900] A. C. 6. (2) 11 App. Cas. 573.

T. L. M.

THE PORT VICTORIA.

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Dec. 11.

Admiralty—Action in Rem—Damage—Negligence—Putting out to Sea to avoid Collision—Loss of Anchor and Chain—Consumption of Stores.

Where the plaintiffs' vessel slipped, and put out to sea, to avoid collision with the defendants' vessel, which had been negligently allowed to drag down upon her and foul her chain :—

Held, by Sir F. H. Jeune P., that the plaintiffs were entitled, in an action in rem, to recover the expenses incurred, namely, the value of the anchor and chain lost, and of the coals and stores consumed.

Action in Rem by plaintiffs, the owners of the *Norman*, to recover the value of an anchor and chain lost, and of coals and stores consumed, in consequence of their vessel having to put to sea to avoid a collision with the *Port Victoria*, owned by the defendants.

The facts, so far as material, were shortly as follows :—

On October 5, 1900, the twin-screw steamship *Norman*, of 7537 tons gross register, from East London to Durban with mails, passengers, and a general cargo, was lying at anchor with seventy-five fathoms of chain out, in a safe and proper berth, in the outer anchorage ground of Port Natal, having about three-quarters of a mile ahead of her the steel screw steamship *Port Victoria*, of 3378 tons gross register, lying with her port anchor down, and forty-five fathoms of chain out. (1)

The weather was clear but threatening, and there was a strong breeze increasing to a moderate gale from the east with a rough and rising sea and a heavy swell.

In these circumstances, about 3.20 p.m., those in charge of the *Norman* observed that the *Port Victoria* was dragging across the bows of the *Norman*, causing risk of collision. The engines of the *Norman* were put slow astern, and chain paid

(1) By art. 7 of the Regulations of the Port and Harbour of Port Natal, issued in 1900 by the Natal Harbour Department, "Vessels should lay at single anchor, with not less than seventy fathoms of chain out, having the second anchor ready for letting go. The anchor should be weighed and sighted occasionally, especially after bad weather. Should any accident occur by which a vessel may drift or lose an anchor, the facts of the case must be notified in writing to the port captain."

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out to 135 fathoms. About two hours afterwards the *Port Victoria* fouled the chain of the *Norman*, and those in charge of the *Norman* signalled to the *Port Victoria*, which had a tug in attendance, to slip her cable and keep clear; but the *Port Victoria* continued to drift, and finally came so close that, to avoid a collision, those in charge of the *Norman* slipped her chain and, putting out to sea, remained in the offing until at daylight she could safely return. The expenditure thereby incurred in coals and stores consumed and anchor and chain lost was agreed at 308*l.* 1*s.* 6*d.*

The defendants, the owners of the *Port Victoria*, admitted the dragging and fouling, but alleged that when the *Norman* arrived she anchored too close to leeward of the *Port Victoria*, and though steam power was not readily available at first, there was a full head of steam when the necessity for its use arrived, and that, on finding their port anchor was foul of the chain of the *Norman*, the starboard anchor was let go, but this also fouled the *Norman's* chain. Those in charge of the *Port Victoria* then hove up and cleared the starboard anchor, and manœuvred the vessel under her engines until the starboard anchor was again let go. The port chain was then cleared, when it was found that the port anchor had lost both flukes, and it was not until both chains had been cleared that the *Norman* slipped.

Scrutton, K.C., and *Mackinnon*, for the plaintiffs, the owners of the *Norman*. The expenses incurred by the plaintiffs were the reasonable and natural consequence of the negligent navigation and management of the *Port Victoria* by the servants of the defendants.

The *Port Victoria* had only forty-five fathoms of chain out, in contravention of the regulations of the port, which require a scope of not less than seventy fathoms. This in itself is indicative of negligence, and the allegation that the *Norman* gave the *Port Victoria* a foul berth is disproved by the evidence. It was owing to the failure of the anchor watch on the defendants' ship to notice that she was dragging that she drifted to within one-third of a mile of the *Norman* before any steps were

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taken, and it was not until she was within two ships' length that the second anchor of the *Port Victoria* was let go. The engines of the *Port Victoria* were not started until she was quite close.

The master of the *Norman* waited until the last moment to see whether those in charge of the *Port Victoria* would take proper steps to keep their vessel out of the way of the *Norman*, and it was not until, according to the evidence, the *Port Victoria* was within sixty feet that the master of the *Norman* slipped his chain. Night was coming on, a gale was blowing, and there was a rough sea. Slipping was the only prudent course to adopt in order to get this large vessel with passengers out of harm's way, and keeping out to sea until at daylight the master could safely come in again was a proper and seamanlike proceeding.

Aspinall, K.C., and *Lewis Noad*, for the defendants, the owners of the *Port Victoria*. Those in charge of the *Norman* unnecessarily got their vessel under way, and unnecessarily proceeded to, and remained at, sea. The *Port Victoria* was under proper control, and there was no collision; but those in charge of the *Norman* were unduly apprehensive, and the evidence suggests that her master became nervous. Under such circumstances an Admiralty action in rem will not lie to recover the alleged loss.

Scrutton, K.C., in reply. The value of an anchor and chain slipped to avoid collision, made imminent by the other ship's fault, has been recovered in Admiralty in America: see the cases cited in Marsden's Collisions at Sea, 4th ed. p. 32.

THE PRESIDENT (SIR F. H. JEUNE). I believe this is the first case exactly of this kind which has been brought in the Admiralty Court; but the principle governing the case appears to be clear and, apparently, in America the principle has been applied in similar circumstances.

It seems to me clear that if a vessel by negligence drags down towards another, and if it is a natural consequence that the other vessel is obliged to take a step which involves her in some expenditure, that is damage for which the first vessel is

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liable. Applying those principles to this case, the first question is, was the *Port Victoria* negligent? Now, certainly, the *Norman* was not negligent in taking up the position she did, because she appears to have given the other vessel a berth of three-quarters of a mile, and the Elder Brethren tell me that was a proper allowance to make, and that no fault is to be alleged against the *Norman* on account of the position she took up. Then the *Port Victoria* undoubtedly dragged down towards her. As regards negligence, I should have thought it was almost a case of res ipsa loquitur. It seems to me that the *Port Victoria* was driving because she had an insufficient scope of cable. She appears to have been violating the rule of the local authorities, which is that a vessel riding in that anchorage should not have less than seventy fathoms of chain—a rule, no doubt, prescribed on account of the knowledge possessed by the authorities of the locality and the dangers to which vessels are there exposed. I do not inquire what exact legal force that rule has, but the *Port Victoria* chose to ride with forty-five fathoms of chain, and afterwards veered out to only sixty-five. Therefore she was not complying with that rule, and it is shewn that she was using an insufficient scope of cable. Then there certainly was a bad look-out, because it is clear that nobody on board her was aware of her dragging until she had dragged a very considerable distance indeed—until she was tolerably close to the *Norman*. The result of that bad look-out was important, because the master of the *Port Victoria* may be right in saying that when he got so near to the *Norman* it might have been unwise to let go the starboard anchor, because it might bring him towards the *Norman* and prevent his going past her as he intended to do. But if those in charge of the *Port Victoria* had, in sufficient time, noticed her dragging, they could have used their starboard anchor and never have got near the *Norman* at all. That appears to me to shew clearly that the *Port Victoria* was negligent in this matter.

I do not say anything about the steam. No doubt the *Port Victoria* ought to have had her steam effectually available, but it is difficult to ascertain exactly what the fact was with regard to her steam; and it is not necessary to go into that question,

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because on the other fact which I have mentioned it is clear to my mind that the *Port Victoria* was negligent.

Under these circumstances, was the expenditure which the *Norman* has been exposed to so far the consequence of the *Port Victoria's* negligence as to make her liable? All that can be said against that is said in the phrase used in the evidence that the master of the *Norman* was unduly apprehensive. That is a matter upon which I have consulted the Elder Brethren, and the view I take upon their advice is that the master of the *Norman* was, if anything, unduly patient. There was a vessel coming down towards him, with the possibility, at any rate, to say nothing more, of the propeller fouling the chain in the same way as the anchor fouled the chain, and the wonder to me is that the master of the *Norman* did not take action sooner than he did. He appears to me to have exercised a great deal of patience and to have abstained from taking any step until a time when it must have been getting on for dark, and it was high time, for the safety of the ship, to take some action. I do not see what action he could have taken except that which he did take—namely, slipping the cable and himself getting away out to sea.

In those circumstances it seems to me that the *Port Victoria* is liable for what occurred, and the natural consequence appears to have been a loss of 308*l.* 1*s.* 6*d.* There will be judgment for the plaintiffs for that sum with costs.

Solicitors for plaintiffs, the owners of the *Norman*: *Parker, Garrett, Holman & Howden.*

Solicitors for defendants, the owners of the *Port Victoria*: *William A. Crump & Son.*

T. L. M.

1901
Aug. 7, 8.

THE MINNEAPOLIS.

Admiralty — Salvage — Apportionment — Classification of Salvors — Special Awards—Non-navigating Portion of the Crew—Horsemen.

A large steamer crossing the Atlantic with passengers and cargo, and a considerable number of horses and cattle, fell in, during bad weather, with a dismasted barque. After her crew had been taken off, and the wreckage cut away, the barque was towed to the Azores. The owners of the barque settled the salvage claim by payment to the owners of the steamer of the sum of 8250*l.*

In an action for apportionment:—

Held, by Gorell Barnes J., that the owners of the salving steamer, who had incurred expenses amounting to 2000*l.*, were entitled to 6175*l.* and the master to 500*l.*, with special awards of 150*l.*, according to rating, to those of the officers and crew who had effected the transfer of the crew of the barque, 300*l.*, according to rating, to those engaged in cutting away the wreckage, 25*l.* to the boat's crew employed during that service, and 75*l.*, according to rating, to the boat's crew engaged in passing ropes, leaving 1025*l.* to be divided amongst the whole crew, but the non-navigating portion (surgeon, purser, cooks, stewards, and stewardess) to share as if rated at one-third of their actual rating, and (distinguishing *The Coriolanus*, (1890) 15 P. D. 103) the horsemen and their foreman—who were in the employ and pay of the owners of the salving steamer, and, having stations assigned to them at the boats, were liable to be called upon to perform duties—to share at one-third of the rating of an A.B.

Action for apportionment of salvage.

The plaintiffs were George Morton, Alexander Robert Douglas, and others, of the crew of the steamship *Minneapolis*. The defendants were the owners of that vessel.

The case raised the question of the proper apportionment of a sum of $40,000 amongst the navigating and non-navigating portion of the crew and the horsemen on board the *Minneapolis*—a twin-screw steamship of 13,401 tons gross register with quadruple expansion engines of 1224 horse-power nominal, from New York to London, with 62 saloon passengers, a general cargo, 273 horses, and 500 head of cattle—which on March 21, 1901, fell in with the four-masted barque *Comet* from Greenock to Philadelphia in ballast. There was at the time a gale blowing from the N.W. with squalls and a heavy

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sea. The *Comet* was disabled, having only her four lower masts, fore, mizen, and cross-jack yards standing. The *Minneapolis* stood by on the first day and night, the weather being too rough to allow of any assistance being rendered, but on March 22 the crew of the *Comet* were taken off, and, the wreckage having been cut away, the *Comet* was taken in tow. On the morning of March 24 she was brought safely off Ponta Delgada, St. Michael, in the Azores, where a tug was engaged for 50*l.* to take her into the harbour. The owners of the *Comet* subsequently paid the owners of the *Minneapolis* the above-mentioned sum by way of salvage remuneration.

1901. Aug. 7. *Laing, K.C.*, and *A. E. Nelson*, for the plaintiffs.

Aspinall, K.C., and *A. Pritchard*, for the defendants.

The details of the services sufficiently appear from the judgment. The arguments of counsel were directed to the special claims of the boats' crews engaged in taking off the crew of the *Comet*, in cutting away the wreckage, and in passing ropes. The question as to what share, if any, of the salvage reward the horsemen were entitled to was argued, and reference made to *The Coriolanus* (1), in which case cattlemen, paid by the owners of the cattle, but nominally on the ship's books, were held to have no claim to rank as salvors.

Cur. adv. vult.

Aug. 8. GORELL BARNES J. This is a suit by some of the crew of the steamship *Minneapolis* against the owners of that vessel, and practically, by reason of the statement of counsel for the plaintiffs that they appeared for the master and all the crew besides those who are on the record as plaintiffs, it is a suit between all those who are interested in the salvage action, which has been settled, to obtain an apportionment of the reward.

It appears that on March 21, 1901, the *Minneapolis* was homeward bound from New York to London with a general cargo and passengers, and in latitude 44° 49′ N. and longitude

(1) 15 P. D. 103.

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35° 47′ W., she fell in with the *Comet*, a four-masted barque bound in ballast from Greenock to Philadelphia to load a cargo of oil for Japan. The *Minneapolis* is a vessel of 13,401 tons gross register, belonging to the Atlantic Transport Line, and she had a crew of 148 persons. There were some sixty-two passengers and a number of horses and cattle.

It is not necessary to go in great detail into the services that were rendered. Substantially, they appear to be these: First of all a lifeboat with an officer and crew was sent to take off the crew of the *Comet*—I presume that at that time it was not certain whether the vessel could be saved or not—and they, in the course of three trips, succeeded in bringing the whole of the crew of the *Comet*, and the master and his wife, on board the *Minneapolis*. Then, later on, the *Minneapolis* sent a boat, with the second officer in charge and others of the crew, for the purpose of cutting away the wreckage of the masts, or some of the masts—I think the foremast and the mizenmast—of the *Comet*, with a view, if possible, of taking the barque in tow, if the risk of her being lost by the puncturing of the hull by the masts was done away with. Some of those men seem to have gone on board, and at very considerable risk succeeded in cutting away the wreckage. That all, I think, took place on March 22. On March 23, the weather having somewhat moderated, the *Minneapolis* was able to take the *Comet* in tow, and on the following day the *Comet* was safely brought to Ponta Delgada in the Azores.

Now, the result of the litigation and settlement between the salvors and the owners of the *Comet* is that a sum of $40,000 was agreed to be paid by the owners of the *Comet* to the salvors as a whole, and that, I am told, represents 8250*l.* in English money. The question before the Court is how is that sum to be apportioned between the owners, master, and crew of the *Minneapolis*. It is quite obvious at the outset that a very large portion must go to the owners of the *Minneapolis*. In the first place, this is a very large vessel, belonging to the line I have referred to, and her value, with cargo, is stated to be 300,000*l.* at least, and there is some freight amounting to 8000*l.* odd. The owners were put to expense which, in round

figures, is stated to be somewhere about 2000*l.*, partly from the consumption of coal, stores, and for extra victualling, and partly the various expenses which were consequent upon the disorganisation of their service through their vessel being late in her arrival and otherwise, details of which were furnished. The real instrument of salvage was this large powerful steamer, because it was by means of her being treated as a tug on the occasion that this vessel was rapidly taken into the Azores.

The apportionment which I propose to make is as follows: To the owners I think the sum of 6175*l.*, having regard to their interests and so forth, should be awarded. Next comes the consideration of the master's claim. The master had a very serious responsibility in determining to deal with such a salvage as this. He was in charge of a very large steamer, with a numerous crew and a number of passengers, and also live stock on board, and it is easy to see that his responsibility is great in determining what to do on such an occasion. I think, having regard to those considerations, that he should receive the sum of 500*l.*

Now I come to deal with some matters which are of importance. They are matters which arise in this way. It is obvious from what I have said that a number of those who are the deck and engine-room and stoke-hole part of the crew did a great deal of extra work in connection with the actual salvage services, because they did not remain simply on board their own steamer, but did outside work, some of it of a substantial and important character. In the first place, there was the transfer of the crew and master and the master's wife from the *Comet* to the *Minneapolis*, which was a most desirable thing to do in order to save their lives if it had not been possible to take the *Comet* in tow. To do that the boat made three trips. Particulars have been furnished me of those who were on board the boat. The names are—Paul, chief officer; Pollard, second officer; Pearce, quartermaster; Morton, Griffiths, Ferguson, Mowat, and Elt, A.B.'s. Apart altogether from the share which they take in the general award to the crew, I think their services ought to be recognised by an award of 150*l.*, to be divided amongst them in proportion to their ratings.

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Then there comes a still more important matter. It appears that the boat was sent in charge, as I have said, of the second officer, Mr. Lazalle, with certain of the crew, to cut away the masts, and we are told that that was a risky and difficult matter to do. They had to go on board the ship, which had no one on board and was rolling about, and somehow to hold on whilst two masts were cut away. Those who did this work appear to have been Mr. Lazalle, Mr. Berkeley, the second engineer; P. Kircaldy, the senior third engineer; J. M'Queggin, leading fireman; H. Porter, fireman; and W. Trim, carpenter. I think those men did a very useful service, because by that means the *Comet* was enabled to be towed, and, as I have said, there was risk in going on board to do this work. Amongst those men I consider that the sum of 300*l.* should be distributed according to their ratings.

Now I have looked through the details of the evidence, but I cannot find who were the persons who were left in the boat, whilst those whom I have mentioned went on board and cut away the masts. I assume that some sailors must have assisted in rowing the boat whilst those men went on board, and, lest I should leave anybody out who assisted in that matter, I think they should get 25*l.* in recognition of their assistance. In addition to that, there was a suggestion made of the merits of those who remained on board the *Comet* whilst she was in tow to St. Michael's; but I find on looking through the list that I have really rewarded all those persons in dealing with the crew of the boat which transferred the crew of the *Comet*, and those who went to cut away the masts, and I do not think it necessary, therefore, to deal in any way specifically with those who remained on board the *Comet*. I do not suppose their danger was a very material matter to consider outside the general award to the officers and crew. But there remains Mr. Brown, the third officer, who was in charge of the boat which went later on, on the 23rd, to pass ropes and make connection. That appears to have been a duty of some danger and difficulty, and I have had no particulars given me exactly as to who were the persons doing that. The names, however, can easily be ascertained. I think there should be divided amongst Mr. Brown

and the seamen who did that work, according to their ratings, a sum of 75*l.*

The result of these deductions is to leave the sum of 1025*l.* to be divided amongst the rest of the crew, and that crew, as I have said, numbered, without the master, 147 persons. That sum should be divided amongst the crew according to their ratings, subject to these qualifications. I have considered the way in which what I may call the navigating and non-navigating members of a crew may be treated in the case of *The Spree* (1), and it is not necessary that I should go over the judgment which I gave in that case, because it would be only repeating a number of reasons which have been there pointed out for differentiating between those who are the real workers of the ship, both on the deck and down in the engine-room department, and those who are merely members of the crew attending, not to working the ship at all, but to working such parts of her as are concerned with the passengers, and otherwise, like the horsemen. Dealing first with the navigating members of the crew, it will be seen from what I have already said that a good number of the deck hands and officers are specially remunerated for what they did outside the ship, and as regards what was done on board the ship I see no particular reason for drawing any particular distinction between the various navigating members of the crew—that is to say, the officers, seamen, engineers, firemen, donkeymen, greasers and trimmers, and so forth; and they, I think, should, therefore, take their share of the 1025*l.*, according to their ratings.

Then there remain a number of persons who were not in the navigating and working department of the ship as a navigating machine, such as the surgeon, cook, steward, stewardess, purser, and so forth. It was not contended before me that any of these persons whom I am now considering were to be excluded from the salvage award, and I think that is the right view to take, for the reasons which I gave in the course of my judgment in *The Spree*. (1) It is quite true that some of these, if not all of them, do not in one sense perform any active service in the rendering of the salvage service, but it must not be

(1) [1893] P. 147.

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forgotten that they are all on the articles, that they are all liable to take their stations, that they are all persons who run some risk in so far as the ship salving is at any extra risk, and that, if any of those persons who went away and assisted had been lost, extra duties would necessarily be required to be performed by those who are left. So I think it would not be wise that these persons should be excluded from the salvage award altogether. I think it would be bad policy and lead to difficulties if they were not recognised. Therefore, I think the parties are right in not suggesting they should be excluded; but at the same time, whatever their merits are, they do not bear a high proportion of the work of those who are actually engaged in performing services on the deck or in the engine-room and so forth, and, having regard to the large size of this steamer, practically they were not in any serious risk. I think the proper course to adopt in this case, and, as I said before in the case of *The Spree* (1), without laying down a rule, as each case must be governed by its merits, because in some cases you might find the steward of the vessel hauling on the ropes, as happened in the case of the *Noordland*, referred to in the case of *The Spree* (2)—I think the proper thing to do is to treat all those with whom I am dealing as if they were rated at one-third of their ratings; that is to say, they will take a share as if their rating was a third of what it really is. It is less, I agree, than what I mentioned in the case of *The Spree* (1), but there are reasons for differentiating. Then there are the horsemen and the horse foreman. Again, it is not now suggested that they should be excluded. Their case is not the same as that of the cattlemen in *The Coriolanus* (3), who were not really servants of the shipowners. These men are really the servants of the shipowners. They are paid so much for the trip, and Mr. Torrie informed me that these men have their stations at the boats, and are liable, therefore, to be called upon to perform duties, so far as they can, very much in the same way as stewards. I think that persons in that position ought to be just as much included in a salvage award as those who are in the cabin

(1) [1893] P. 147. (2) [1893] P. 147, at p. 153, n.
(3) 15 P. D. 103.

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department. In order to recognise their position, and yet not reward them as if they had done a great deal, I think the proper thing to do—and the Elder Brethren, with whom I have had a long consultation, agree—is to treat them as rated at one-third of the rating of an A.B., and let them take a proportion on that basis.

The costs will be borne by the parties in proportion to their awards.

Solicitors for plaintiffs: *Lowless & Co.*

Solicitors for defendants: *Pritchard & Sons.*

T. L. M.

[IN THE CONSISTORY COURT OF ROCHESTER.]

1901

Oct. 19, 21, 22, 26, 28; *Nov.* 2, 19.

THE OFFICE OF THE JUDGE PROMOTED BY SWEET AND OTHERS *v.* YOUNG.

Ecclesiastical Law—Jurisdiction—Clergy Discipline Act, 1892 (55 & 56 *Vict.* c. 32), *ss.* 2, 3, 12—*Offence against Morality—Immoral Conduct—Canons* 71 *and* 109 *of* 1603—*Conduct unworthy of the Character of Minister of Religion.*

The nature and character of the immorality and immoral conduct within the Clergy Discipline Act, 1892, considered.

IN this suit the defendant, the Rev. Charles Gordon Young, rector of the parish of Chipstead, in the county of Surrey and diocese of Rochester, was prosecuted under the 2nd section of the Church Discipline Act, 1892, by Charles Sweet, Reginald Wynn Rucker, and Wentworth Ewing Cattley, parishioners of that parish, who in their complaint charged him (charges 1 to 4 and 7 to 17) with having been drunk on numerous specified occasions, and (charge 6) with immoral conduct on one occasion, the particulars of this last-mentioned charge being therein set forth as follows: "6. On or about July 4, 1899, at about 1.30 A.M., the defendant was in a dancing-room at the Alsatian Club in Oxford Street, London, with a prostitute on his knee, and behaving himself in an immoral and riotous manner with the said prostitute and other prostitutes."

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The defendant filed an answer admitting charge 6 of the complaint down to the word "London," and denying the remainder of that charge and all the other charges in the complaint.

1901. Oct. 19. On this day the case came on for trial before the Chancellor of the Diocese of Rochester (Lewis T. Dibdin, Esq., K.C.), sitting with the following five assessors: the Rev. Canon Palmer, the Rev. C. P. Greene, the Rev. W. H. Jackson, Sir C. Douglas Fox, and W. Cowell Davies, Esq. (1) The trial was continued on October 21, 22, 26, and 28, and November 2 last.

Evidence was given orally in Court both on behalf of the prosecutors in support of the complaint and on behalf of the defendant. The defendant, being examined as a witness on his own behalf, admitted in evidence that he had been present at the Alsatian Club at the time and place referred to in the sixth charge of the complaint, but denied the truth of the remaining allegations in that charge.

It appeared in evidence that the Alsatian Club had, subsequently to the date of the occasion referred to in the sixth charge of the complaint, been raided as a disorderly house by the police and closed.

Gill, K.C., and *G. J. Talbot*, for the prosecutors.

Rawlinson, K.C., and *Longstaffe*, for the defendant, argued that, quite apart from the evidence of the defendant that he had visited the Alsatian Club merely for curiosity and had not been there guilty of any immoral act whatever, the evidence given on behalf of the prosecutors in support of charge 6 of the complaint did not disclose any offence cognizable under the 2nd section of the Clergy Discipline Act, 1892 (2), and that,

(1) The Court sat by consent in the Royal Courts of Justice, London.

(2) The 2nd section of the Clergy Discipline Act, 1892, provides as follows: "If a clergyman . . . . is alleged to have been guilty of any immoral act, immoral conduct, or immoral habit, or of any offence against the laws ecclesiastical being an offence against morality and not being a question of doctrine or ritual, he may be prosecuted by any of the parishioners of the parish in which such clergyman holds preferment, or by the bishop of the diocese, or by any person approved by the bishop,

even if any ecclesiastical offence had been committed by the defendant in respect of any of the matters referred to in that charge, the offence in question was the ecclesiastical offence "of occasioning scandal and evil report," an offence which could only be legally tried under the Church Discipline Act of 1840 (3 & 4 Vict. c. 86): *The Bishop of Rochester* v. *Harris.* (1)

[THE CHANCELLOR referred to *Beneficed Clerk* v. *Lee.* (2)]

Gill, K.C., replied.

The Chancellor, at the close of the trial, after consulting the assessors, delivered judgment, pronouncing the decision of the Court on the whole of the charges before it. The following is the portion of his judgment which relates to charge 6 of the complaint.

THE CHANCELLOR read the particulars of the charge in question as above set out, and continued:—It is admitted that the defendant was at the place referred to in this charge at the time charged. We consider it proved that he had a prostitute on his knee without appearing to resent it, and that he remained in this place for a considerable time, was noisy and excited, and was talking and joking with this woman and with other women of the same class. We therefore find the defendant guilty of this charge as a matter of fact.

But I have to consider whether this is a charge properly cognizable under the Clergy Discipline Act, 1892. It has been argued on behalf of the defendant that it is not so cognizable, and if it is not, then this Court, constituted as it is for this case, has no jurisdiction to deal with this charge.

The question turns on the proper construction of certain words in the 2nd section of the Clergy Discipline Act, 1892,

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and tried in the Consistory Court of the diocese in which he holds preferment . . . ."

By the 12th section of the same Act it is provided that unless the context otherwise requires the expressions "immoral act," "immoral conduct," and "immoral habit" shall include such acts, conduct, and habits as are proscribed by the 75th and 109th canons issued by the Convocation of the Province of Canterbury in the year 1603. [Canons 75 and 109 of the Canons of 1603 are set out in the judgment of the Chancellor.]

(1) [1893] P. 137.

(2) [1897] A. C. 226.

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which enacts that a clergyman alleged to have been guilty of any immoral act, immoral conduct, or immoral habit, or of any offence against the laws ecclesiastical being an offence against morality (not being a question of doctrine or ritual) may be prosecuted under the Act.

The word "immoral" is susceptible of more than one meaning, and the only clue the Act affords as to the meaning in which the word is therein used is in the 12th or definition section, in which it is said that the expressions "immoral act," &c., shall include such acts, &c., as are "proscribed" by the 75th and 109th canons of 1603. That 75th canon is as follows:—

"No ecclesiastical person shall at any time, other than for their honest necessities, resort to any taverns or alehouses, neither shall they board or lodge in any such places. Furthermore, they shall not give themselves to any base or servile labour, or to drinking or riot, spending their time idly by day or by night, playing at dice, cards, or tables, or any other unlawful games; but at all times convenient they shall hear or read somewhat of the Holy Scriptures, or shall occupy themselves with some other honest study or exercise, always doing the things which shall appertain to honesty, and endeavouring to profit the Church of God; having always in mind that they ought to excel all others in purity of life, and should be examples to the people to live well and Christianly, under pain of ecclesiastical censures, to be inflicted with severity, according to the qualities of their offences."

The 109th canon is as follows:—

"If any offend their brethren either by adultery, whoredom, incest, or drunkenness, or by swearing, ribaldry, usury, and any other uncleanness and wickedness of life, the churchwardens or questmen or sidesmen in their next presentments to their ordinaries, shall faithfully present all and every of the said offenders to the intent that they and every of them may be punished by the severity of the laws according to their deserts; and such notorious offenders shall not be admitted to the Holy Communion till they be reformed."

The question of the scope of the word "immoral" in this Act was considered by the Judicial Committee of the Privy

Council in *Beneficed Clerk* v. *Lee*. (1) The precise point in that case was whether "simony" is "immorality" within the meaning of the Act. It was held that it was not; but Lord Halsbury, in delivering the judgment of the Committee, explained the effect of the reference to the two canons I have read. He said: "The language of these canons denounces offences which the 109th canon sums up as 'uncleanness and wickedness of life,' but it goes further, and it condemns acts and conduct hardly to be considered immoral, but certainly dangerous to the reputation or unworthy of the character of ministers of religion. It appears to their Lordships that in thus applying and extending the use of the term 'immoral' the Act shews that the intention was to confine its scope to offences of the kind referred to in these canons."

I think these observations have an important application to this case.

It is proved that the Alsatian Club was, before it was closed as a disorderly house, a well-known night club frequented by men and prostitutes, where dancing was carried on very late at night after all respectable places of entertainment had been closed.

The defendant went there after 12 at night at the end of an evening spent at different places of entertainment, and then, after realizing the character of the place, stayed there three-quarters of an hour, talking and joking with prostitutes and behaving himself in the manner that has been described.

I have not to decide whether the mere fact of a clergyman being in such a place, however regrettable, would be enough to create an offence under this Act. I can conceive circumstances which might explain or justify his presence. But I think that, under the circumstances proved in this case, Mr. Young's presence and action at this place constitute conduct so "dangerous to the reputation and unworthy of the character of ministers of religion"—to quote Lord Halsbury's words—as to be contrary to the 75th and 109th canons, and therefore "an offence against the laws ecclesiastical" as well as "an offence against morality" within the meaning of the Clergy Discipline Act, 1892.

(1) [1897] A. C. 226.

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The result is that I hold that this charge (No. 6) is cognizable by this Court. As I have already said, we find that it has been proved, and that the defendant is guilty on this charge.

I desire to say that the Court is unanimous in respect of all its findings. (1)

On November 19 last the Bishop of Rochester pronounced sentence, depriving the defendant ab officio et beneficio.

Solicitors for prosecutors: *Wontner & Sons.*
Solicitors for defendant: *Sayle, Carter & Co.*

C. F. J.

C. A.

1901

Nov. 26; *Dec.* 16, 19.

[IN THE COURT OF APPEAL.]

THE WINKFIELD.

Admiralty—Collision—Limitation of Liability—Bailment—Loss of Chattel by Negligence of Wrongdoer—Claim by Bailee against Fund in Court—Possessory Title as against Wrongdoer—Measure of Damage.

In an action against a stranger for loss of goods caused by his negligence, the bailee in possession can recover the value of the goods, although he would have had a good answer to an action by the bailor for damages for the loss of the thing bailed.

Claridge v. *South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422, overruled.

APPEAL by the Postmaster-General against a decision of Sir F. H. Jeune P. confirming a report of the registrar disallowing a portion of a claim in respect of the contents of certain mail-bags lost in a collision.

The case raised the question as to the rights of the Postmaster-General as bailee of letters and parcels in transit by post.

The facts were shortly as follows:—

On April 5, 1900, a collision occurred in a fog off Table Bay,

(1) With respect to the charges of drunkenness in the complaint, the Court found the defendant guilty on charges 2, 3 (in part), 4, 11, 13, and 14, and not guilty on charges 1, 3 (in part), 7, 8, 10, 17, on which the prosecutors offered no evidence, and on charges 9 and 15. Charges 12 and 16 were abandoned.

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on the coast of Cape Colony, South Africa, between the Government transport *Winkfield*, belonging to the Seafield Shipping Company, Limited, outward bound to the Cape with troops for service in South Africa, and the Union mail steam vessel *Mexican* from Cape Town, homeward bound to Southampton with mails, passengers, and cargo. The *Winkfield* was damaged and the *Mexican* sank, but not until all the passengers, crew, and some of the mails and luggage of the *Mexican* had been got on board the other vessel.

The owners, master, and crew of the *Mexican* and the owners of the *Winkfield* commenced cross-actions, which resulted in the owners of the *Winkfield* admitting liability for a moiety of the damage sustained by the *Mexican*, and, the owners of the *Winkfield* having commenced proceedings against the owners of the *Mexican* and all other persons having claims arising out of the collision, they, on July 24, obtained the usual decree, under s. 503 of the Merchant Shipping Act, 1894, limiting their liability in respect of loss of, or damage to, vessels, goods, merchandise, or other things to 8*l.* per ton, and paid into court (inclusive of interest) the sum of 32,514*l.* 17*s.* 10*d.*

Against this fund claims by the owners of the *Mexican*, by her master and crew, by passengers, and by cargo owners, were filed in the Admiralty Registry amounting to 90,085*l.* 7*s.* 2*d.* These were allowed at 75,810*l.*, including a claim for 5147*l.* 8*s.* 5*d.* (allowed at 5145*l.*), filed by the Postmaster-General, on behalf of himself and the Postmasters-General of Cape Colony and Natal, and made up of the two following items, namely :—

(1.) 105*l.* 10*s.* 11*d.*, the value of 282 cases of postal parcels and 678 mail-bags lost on board the *Mexican*. This claim, made on behalf of the Crown in respect of its own property, was admitted by the registrar on the authority of *The Zoe*. (1)

(2.) 5041*l.* 17*s.* 6*d.*, the value of the contents of 334 parcels, and 1155 registered letters, in respect of which the parties interested had made claims upon the Postmaster-General, and given him written authority to represent them in these proceedings. This claim was admitted by the registrar on the

(1) (1886) 11 P. D. 72.

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ground of the saving of expense by allowing the Postmaster-General to make a claim instead of separate claims by the parties concerned; but the apportionment of the fund in court amongst the several claimants was postponed pending a motion on behalf of the Postmaster-General in objection to so much of the report of the registrar, dated March 29, 1901, as disallowed—

(3.) A claim of 1706*l.* 19*s.* 4*d.*, the estimated value of the contents of letters and parcels in respect of which no claim had been made by, or instructions received from, the senders or addressees, but which the Postmaster-General undertook to distribute amongst them, and, in order to comply with the terms of a decision in an action in rem in the case of *The Minna* (1), further undertook to indemnify the fund in court against any claims put forward by the actual owners.

On June 10, 1901, the President (Sir F. H. Jeune) overruled the objection, and upheld the decision of the registrar, on the same ground, namely, that the Postmaster-General, as representing the Crown, was not under any liability to the parties interested in the lost letters and parcels included under the third head, and, therefore, was precluded, by the case of *Claridge* v. *South Staffordshire Tramway Co.* (2), from claiming for their value. Costs reserved.

On appeal:—

1901. Nov. 26. *The Attorney-General* (*Sir Robert Finlay, K.C.*), and *Acland*, for the Postmaster-General. In *Claridge* v. *South Staffordshire Tramway Co.* (2) the plaintiff, an auctioneer to whom a horse had been delivered by the owner for sale with liberty to use until sold, brought an action in a county court against the defendants, a tramcar company, for the diminution in value of the horse injured by the negligence of the defendants. The judge directed the jury that the plaintiff as bailee was under no liability to his bailor for the injury to the horse, and therefore could not recover. A Divisional Court, consisting of Hawkins and Wills JJ., affirmed the decision; but in

(1) (1868) L. R. 2 A. & E. 97. (2) [1892] 1 Q. B. 422.

Meux v. *Great Eastern Ry. Co.* (1) the late Master of the Rolls (Sir A. L. Smith) said that *Claridge's Case* (2) "may possibly require at some future time further consideration," and it is now submitted that it was wrongly decided.

Chief Justice Holmes, in his lectures on the Common Law (3), traces the origin of the rule as to the right of the bailee to sue to the time when, in the primitive condition of society in England, the arm of the law had to be called in to check the practice of cattle stealing, and it is shewn that the person in actual possession of the cattle at the time they were stolen was of necessity the proper person to follow the trail and institute proceedings for their recovery. The procedure provided by the law turned on the single question whether the plaintiff had lost possession against his will, and was modelled on the self-redress "natural to the case which gave rise to it, (and) was the only remedy. (It) was confined to the man in possession, and was not open to the owner unless he was that man"; in other words, "if chattels were intrusted by their owner to another person, the bailee, and not the bailor, was the proper party to sue for their wrongful appropriation by a third"; and if the bailee "sold or gave the goods in his charge to another, the owner could only look to the bailee and could not sue the stranger . . . . because there was no form of action known which was open to him." Bracton (4) says that one may sue for his chattel as stolen, by the testimony of good men, and that it does not matter whether the thing thus taken was his own property or another's, provided it was in his custody. Holmes C.J. adds: "as the remedies were all in the bailee's hands, it also followed that he was bound to hold his bailor harmless. If the goods were lost, it was no excuse that they were stolen without his fault. He alone could recover the lost property, and therefore he was bound to do so . . . . At first the bailee was answerable to the owner, because he was the only person who could sue; but though this strict liability remained, cause

(1) [1895] 2 Q. B. 387, at p. 394.
(2) [1892] 1 Q. B. 422.
(3) The Common Law, by O. W. Holmes, Jr., (1882) Macmillan & Co. Lecture V. The Bailee at Common Law, pp. 166, 167, 175 to 180.
(4) Fol. 150 b, 151.

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and effect were inverted, and it was said that the bailee could sue because he was answerable to the owner." This liability to the bailor being, however, founded on the remedy the bailee had over against the wrongdoer, it ceased where the remedy ceased, so that in 1455 in an action of debt against the marshal of the Marshalsea (1) for an escape of a prisoner, and the defence was that enemies of the King broke into the prison and carried off the prisoner against the will of the defendant, the Court said that, if alien enemies of the King—for instance, the French—released the prisoner, or perhaps if the burning of the prison gave him a chance to escape, the excuse would be good, "because then (the defendant) has remedy against no one"; but if subjects of the King broke the prison the defendant would be liable, because it is implied that the defendant would have a right of action against them, and therefore would himself be answerable. For a similar reason there was some hesitation as to robbery where the robber was unknown, and so the bailee had no remedy over, and even as to robbery generally, on the ground that by reason of the felony the bailee could not go against either the robber's body or his estate; for the one was hanged and the other forfeited (2); but the bailee was not excused by an ordinary wrongful taking. "If the goods are taken by a trespasser of whom the bailee has conusance, he shall be chargeable to his bailor, and shall have his action over against his trespasser." (3) The principle to be deduced from this reasoning is that, if the bailee parted with the property to another, the owner could not recover it, but must get his indemnity from the bailee—that is to say, the bailee was absolutely responsible for loss, even when happening without his fault, but where he had no remedy he was not answerable.

It may, therefore, be asserted that from time immemorial bailees have been regarded in English law as possessors and entitled to possessory remedies—that is to say, the right of the bailee to bring his action rests, not on his being chargeable over, but as against a wrongdoer, on his possessory title, and

(1) Y. B. 33 Hen. 6, 1, pl. 3.
(2) Y. B. 6 Hen. 7, 12, pl. 9.
(3) Y. B. 3 Hen. 7, 4, pl. 16; see also 10 Hen. 6, 21, pl. 69; 11 Hen. 4, 24 b.

he recovers on the strength of his possession just as in the case of a finder: *Armory* v. *Delamirie*. (1) This view that the infringement of the possessory right is the true cause of action is established by a long line of authorities.

In *Sutton* v. *Buck* (2), in trover for portions of a wrecked ship, it was held that possession under a general bailment is sufficient title for the plaintiff who was in possession of the ship, but without title as the transfer was void: see also the American case of *Lyle* v. *Barker*. (3) That the infringement of the possessory right was the true cause of action was insisted on in *Rooth* v. *Wilson* (4), a case of agistment, and it was clearly laid down that the right of the bailee in possession to recover against a wrongdoer was the same in case as in trover. Bayley J. there says that "case is a possessory action." So in *Burton* v. *Hughes* (5), where the plaintiff who had borrowed furniture, and was therefore bailee, was nevertheless held entitled to sue the wrongdoer in trover though no title was proved. In *Moore* v. *Robinson* (6) an action of trespass for cutting a rope was successful by the man in charge of a barge. In *Nicolls* v. *Bastard* (7) an action for trover failed because of the want of possession. Parke B. there says that no doubt the bailor may sue as well as the bailee, and "whichever first obtains damages it is a full satisfaction," which must mean the full value in whichever action was first, otherwise the wrongdoer would only have to compensate for one interest, either of which might be but a fractional part of the whole value. In the American case of *White* v. *Webb* (8) it was held that the bailee, as against a stranger, can recover the whole value, any balance, beyond his special property, being held for the owner. See Kent's Commentaries, 12th ed. vol. ii. p. 568, note (*e*). In *Brierly* v. *Kendall* (9), where it was held that the assignor of goods as security for a debt could only

(1) (1722) 1 Stra. 504.

(2) (1810) 2 Taunt. 302, see pp. 308, 309; 11 R. R. 585.

(3) (1813) 5 Binn. 457, at p. 460.

(4) (1817) 1 B. & A. 59, at p. 62; 18 R. R. 431.

(5) (1824) 2 Bing. 173; 27 R. R. 578.

(6) (1831) 2 B. & Ad. 817; 36 R. R. 756.

(7) (1835) 2 C. M. & R. 659, at p. 660.

(8) (1842) 15 Conn. Rep. 302.

(9) (1852) 17 Q. B. 937, at pp. 942, 943.

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recover in trover the value of his interest in the goods seized by the assignee, the dicta of Campbell C.J. are distinctly in favour of the present line of argument. In *Jeffries* v. *Great Western Ry. Co.* (1) it was held immaterial as against the wrongdoer that in an action of trover the plaintiff in possession of trucks had no title, for a person who wrongfully does an injury to a chattel is estopped from alleging that the party in possession of the chattel at the time of the injury done was not the true owner, possession being a good title as against a wrongdoer. So *Waters* v. *Monarch Life Insurance Co.* (2) and *London and North Western Ry. Co.* v. *Glyn* (3) shew that a man may recover more than his interest, and that a warehouseman or a carrier may recover of the insurer the full value, although protected from responsibility for loss by fire. In *Turner* v. *Hardcastle* (4), on the question of damages, the full value was recovered in trover by bailee against wrongdoer.

These authorities demonstrate not only the right of the bailee to maintain an action, but cover also the question of the measure of damages recoverable in such action. The cases cited and the text-writers referred to shew that at a very early stage the bailee was the only person who could sue, and also that he was the person bound to sue because his remedy was exclusive, and it was his duty, therefore, to exert himself for his bailor. Subsequently the rule was misunderstood and based on his liability over, but that inversion of the rule has not prevailed, and though, in later times, the bailor was allowed to sue, that did not take away the right of the bailee, whose possession as against a wrongdoer gave him a complete title to recover the full value, without distinction whether the action was in trespass, trover, or case.

It is submitted, therefore, that the plaintiff in *Claridge's Case* (5), as bailee of a horse to which an injury was done, while in his possession, by a third person, was entitled to recover from the wrongdoer the amount of the depreciation of the horse, notwithstanding that the injury was inflicted under circumstances which imposed no liability upon the plaintiff

(1) (1856) 5 E. & B. 802, at p. 808.
(2) (1856) 5 E. & B. 870.
(3) (1859) 1 E. & E. 652.
(4) (1862) 11 C. B. (N.S.) 683.
(5) [1892] 1 Q. B. 422.

towards his bailor; and it is similarly submitted that, as between the Postmaster-General and the owners of the *Winkfield*, that is to say, as between possessor and wrongdoer, the person who has possession has the property, and it is not open to the wrongdoer to inquire into the nature or limitation of the right of the possessor; so that the Postmaster-General, as bailee in possession, without regard to the question of his liability over, is entitled to recover, out of the fund which the owners of the *Winkfield* have paid into court, the item amounting to 1706*l.* 19*s.* 4*d.*, or such other sum as the registrar and merchants may find to be due.

Pickford, K.C., and *Lauriston Batten*, for the respondents, cargo claimants. It lies on the appellant to establish that he was bailee in possession; but the letters and parcels at the time of the loss were in the possession of the owners of the carrying ship, and not of the Postmaster-General, whose position was that of forwarding agent. Assuming, however, that he was bailee in possession, the decision in the Court below disallowing his claim was right, for not being a trustee of, or otherwise liable to account to, the senders and addressees, the case falls directly within *Claridge* v. *South Staffordshire Tramway Co.* (1)

Any other view would be fraught with grave inconvenience, for the money recovered in competition with the other claimants on the fund in court would remain in the hands of the Postmaster-General as he is not in a position to distribute it, no claim having been made upon him by the interested parties, nor any authority given him to intervene on their behalf in these proceedings, and by giving the Postmaster-General liberty to put forward this claim two principles of law would be violated, for if an action is held to lie without inquiry as to the rights of the bailor the effect would, in the first place, be to give the Postmaster-General as bailee a right of action for damages which he had not sustained, and, secondly, leave the defendant exposed to another action by the bailor in respect of the same wrong.

(1) [1892] 1 Q. B. 422.

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From an historical point of view also the rule which Holmes C.J. in his work on the Common Law insists upon, namely, that the possession of the bailee was the ground of his right of action, is not accepted by other text-writers. Pollock and Maitland (1) say: "In the days when the actio furti still preserved many of its ancient characteristics, when it began with hue and cry and hot pursuit, it was natural that the bailee, rather than the bailor, should sue the wrongful possessor; but already in the thirteenth century a force was at work which tended to disturb this arrangement"; and they go on to say that it will be found that "the rule that the bailee has the action against the stranger (was) in close connection with a rule that makes the bailee absolutely responsible to the bailor for the safe return of the goods." They then say, with reference to the "rule which equips every bailee with the action against the wrongful taker, and denies that action to the bailor: Perhaps we come nearest to historical truth if we say that between the two old rules there was no logical priority. The bailee had the action because he was liable and was liable because he had the action." Again they say: "In Bracton's text and in the case law of Bracton's day we may see . . . . a tendency to require of the bailee who brings an appeal of larceny, or an action of trespass, something more than mere possession, some interest in the thing, some responsibility for its safety. . . . Bracton, f. 103, b. 146, more than once seems to require that the appellor shall complain of a theft of his own goods or of goods for which he has made himself responsible, for which intravit in solutionem erga dominum suum. This phrase is actually used by appellors in 1203." (2) The learned authors here draw attention to the Roman law on the subject by adding "that Bracton is thinking of Justinian's Institutes, iv. 2, § 2, where it is required of the plaintiff in an action bonorum raptorum that he shall have some interest in the thing 'ut intersit ejus non rapi,'" and it would appear that according to the civil law—which has always been followed in

(1) History of English Law, (1895) vol. ii. pp. 169, 170. [In 2nd ed. 1898 the original paging is noted in the margin.]

(2) Select Pleas of the Crown, pl. 88, 126.

Admiralty where not in conflict with English law—as the Postmaster-General is not liable to account, he has no interest in the preservation of the thing (nec ob id ejus interest rem salvam esse: Just. Inst. iv. 1, § 17), and therefore could not recover.

The correct view would, therefore, seem to be that the right of action to recover the value rested on the liability of the bailee to account to the bailor. Beaumanoir (1), writing in 1283, says that, if a hired thing is stolen, the suit belongs to the bailee, because he is answerable to the person from whom he hired. Similar statements occur again and again in the Year Books. Thus a judge of the Common Bench says in 1410 (2): "If a stranger takes beasts in my custody, I shall have a writ of trespass against him, and shall recover the value of the beasts, because I am chargeable for the beasts to my bailor who has the property"; and Holmes C.J. after referring to this case is obliged to admit that (3) "There are cases in which this reasoning was pushed to the conclusion that if, by the terms of the trust, the bailee was not answerable for the goods if stolen he would not have an action against the thief."

The same explanation of the right of the bailee to sue is, in later times, laid down with precision, as in *Heydon* v. *Smith* (4), where it is said that a bailee "shall recover all in damages because that he is chargeable over." In *Rooth* v. *Wilson* (5), cited on behalf of the appellant, Lord Ellenborough distinctly rested the right of the bailee to recover the value of the chattel on the ground of his liability over to his bailor. In *Swire* v. *Leach* (6), where pledges had been wrongfully taken in distress by the landlord of a pawnbroker, Erle C.J. lays stress on the liability of the bailee to account to the bailor, for the right of the bailee to the full value rests on his liability for the safe custody of the property of the bailor—that is, "his damages

(1) XXXI. 16.

(2) Y. B. 11 Hen. 4, 24 b. See further Y. B. 3 Hen. 7, 4, pl. 16; 20 Hen. 7, 1, pl. 1; 21 Hen. 7, 14, pl. 23; 8 Edw. 4, 6, pl. 5; 9 Edw. 4, 34, pl. 9.

(3) Holmes on the Common Law, p. 170.

(4) (1611) 13 Rep. 67 at f. 69: see Vin. Abr. Trespass, M. 7. See also Roll. Abr. Trespass, M. 2; Bac. Abr. Trespass (C) 655.

(5) 1 B. & A. 59.

(6) (1865) 18 C. B. (N.S.) 479, at p. 486.

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against the stranger will be the entire value of the thing if he is liable over to the owner": Mayne on Damages, 6th ed. (1899) p. 416. There does not appear to be any case where the bailee has not been liable over and yet has recovered the whole value. In the cases cited by the appellant the liability of the bailee to the bailor is assumed. In the majority of those cases the question of the measure of damage did not arise, and the American cases cited in favour of the appellant are not binding on this Court. Where the question of damage has been dealt with in actions of trespass the measure has been the loss sustained by the bailee, not the full value, and in order to obtain the full value from a wrongdoer in an action by the bailee the obligation to account must arise before judgment, otherwise the bailee can only recover the actual amount of loss which he has sustained; and in the present case it is admitted that the Postmaster-General as bailee has not sustained any damage.

[They also referred to *Dockwray* v. *Dickenson* (1); *Addison* v. *Overend* (2); Beven on Negligence in Law, 2nd ed. vol. ii. pp. 884 to 886, and notes; Clerk and Lindsell on Torts, (1896) pp. 234 to 238.]

The Attorney-General, in reply. The argument of the respondents based on the Year Books may be dealt with by quoting a passage from Holmes C.J.'s lectures on the Common Law, p. 170. Bearing in mind, he says, "the inverted explanation of Beaumanoir that the bailee could sue because he was answerable over, in place of the original rule, that he was answerable over so strictly because only he could sue, we find the same reasoning often repeated in the Year Books, and, indeed, from that day to this, it has always been one of the commonplaces of the law."

No doubt there is some hesitation in the expression of opinion by Pollock and Maitland, in their History of English Law, as to the priority of the rule that gives the action to the bailee, but they seem to be in substantial agreement with Holmes C.J., for at p. 169, vol. ii., they say: "Now it would

(1) (1696) Skin. 640. (2) (1796) 6 T. R. 766; 34 R. R. 775.

seem that if goods were unlawfully taken from the possession of the bailee, it was he that had the action against the wrong-doer; it was for him to bring the appeal of larceny or the action of trespass," and, after quoting from Bracton, f. 151, as to the question being one of possession only, "Et non refert utrum res quæ ita subtracta fuit, extiterit illius appellantis propria vel alterius, dum tamen de custodia sua," they say, "and having thus given the action to the bailee we must in all probability deny it to the bailor"; and at p. 171, with reference to this proposition they add: "We can hardly doubt that this is the starting point of our Common Law."

It has been contended on behalf of the respondents that to allow either the bailee or the bailor to sue is not reasonable, and that the bailee's right should be restricted to his interest; but Parke B. lays it down clearly in *Nicolls* v. *Bastard* (1), that the bailee suing first can obtain full satisfaction, and by so doing ousts the bailor of his remedy.

Christopher Head, for the owners of the *Winkfield*.

Scrutton, K.C., watched the appeal on behalf of the owners of the *Mexican*.

Cur. adv. vult.

Dec. 16. COLLINS M.R. This is an appeal from the order of Sir Francis Jeune dismissing a motion made on behalf of the Postmaster-General in the case of *The Winkfield*.

The question arises out of a collision which occurred on April 5, 1900, between the steamship *Mexican* and the steamship *Winkfield*, and which resulted in the loss of the former with a portion of the mails which she was carrying at the time.

The owners of the *Winkfield* under a decree limiting liability to 32,514*l.* 17*s.* 10*d.* paid that amount into court, and the claim in question was one by the Postmaster-General on behalf of himself and the Postmasters-General of Cape Colony and Natal to recover out of that sum the value of letters, parcels, &c., in his custody as bailee and lost on board the *Mexican*.

The case was dealt with by all parties in the Court below as a claim by a bailee who was under no liability to his bailor for

(1) 2 C. M. & R. 659.

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the loss in question, as to which it was admitted that the authority of *Claridge* v. *South Staffordshire Tramway Co.* (1) was conclusive, and the President accordingly, without argument and in deference to that authority, dismissed the claim. The Postmaster-General now appeals.

The question for decision, therefore, is whether *Claridge's Case* (1) was well decided. I emphasize this because it disposes of a point which was faintly suggested by the respondents, and which, if good, would distinguish *Claridge's Case* (1), namely, that the applicant was not himself in actual occupation of the things bailed at the time of the loss. This point was not taken below, and having regard to the course followed by all parties on the hearing of the motion, I think it is not open to the respondents to make it now, and I therefore deal with the case upon the footing upon which it was dealt with on the motion, namely, that it is covered by *Claridge's Case.* (1) I assume, therefore, that the subject-matter of the bailment was in the custody of the Postmaster-General as bailee at the time of the accident. For the reasons which I am about to state I am of opinion that *Claridge's Case* (1) was wrongly decided, and that the law is that in an action against a stranger for loss of goods caused by his negligence, the bailee in possession can recover the value of the goods, although he would have had a good answer to an action by the bailor for damages for the loss of the thing bailed.

It seems to me that the position, that possession is good against a wrongdoer and that the latter cannot set up the jus tertii unless he claims under it, is well established in our law, and really concludes this case against the respondents. As I shall shew presently, a long series of authorities establishes this in actions of trover and trespass at the suit of a possessor. And the principle being the same, it follows that he can equally recover the whole value of the goods in an action on the case for their loss through the tortious conduct of the defendant. I think it involves this also, that the wrongdoer who is not defending under the title of the bailor is quite unconcerned with what the rights are between the bailor and bailee, and

(1) [1892] 1 Q. B. 422.

must treat the possessor as the owner of the goods for all purposes quite irrespective of the rights and obligations as between him and the bailor.

I think this position is well established in our law, though it may be that reasons for its existence have been given in some of the cases which are not quite satisfactory. I think also that the obligation of the bailee to the bailor to account for what he has received in respect of the destruction or conversion of the thing bailed has been admitted so often in decided cases that it cannot now be questioned; and, further, I think it can be shewn that the right of the bailee to recover cannot be rested on the ground suggested in some of the cases, namely, that he was liable over to the bailor for the loss of the goods converted or destroyed. It cannot be denied that since the case of *Armory* v. *Delamirie* (1), not to mention earlier cases from the Year Books onward, a mere finder may recover against a wrongdoer the full value of the thing converted. That decision involves the principle that as between possessor and wrongdoer the presumption of law is, in the words of Lord Campbell in *Jeffries* v. *Great Western Ry. Co.* (2), "that the person who has possession has the property." In the same case he says (3): "I am of opinion that the law is that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him, having no title in himself, is a wrongdoer, and cannot defend himself by shewing that there was title in some third person, for *against a wrongdoer possession is title.*" The law is so stated by the very learned annotator in his note to *Wilbraham* v. *Snow*." (4) Therefore it is not open to the defendant, being a wrongdoer, to inquire into the nature or limitation of the possessor's right, and unless it is competent for him to do so the question of his relation to, or liability towards, the true owner cannot come into the discussion at all; and, therefore, as between those two parties full damages have to be paid without any further inquiry. The extent of the liability of the finder to the true owner not being relevant to the discussion between him and

(1) 1 Stra. 504.
(2) 5 E. & B. 802, at p. 806.
(3) 5 E. & B. 802, at p. 805.
(4) 2 Wms. Saund. 47 f.

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the wrongdoer, the facts which would ascertain it would not have been admissible in evidence, and therefore the right of the finder to recover full damages cannot be made to depend upon the extent of his liability over to the true owner. To hold otherwise would, it seems to me, be in effect to permit a wrongdoer to set up a jus tertii under which he cannot claim. But, if this be the fact in the case of a finder, why should it not be equally the fact in the case of a bailee? Why, as against a wrongdoer, should the nature of the plaintiff's interest in the thing converted be any more relevant to the inquiry, and therefore admissible in evidence, than in the case of a finder? It seems to me that neither in one case nor the other ought it to be competent for the defendant to go into evidence on that matter.

I think this view is borne out by authority; for instance, in *Burton* v. *Hughes* (1) the plaintiff, who had borrowed furniture, and was therefore bailee, was held to be entitled to sue in trover wrongdoers who had seized it without giving in evidence the written agreement under which he held it. The point made for the defendant was that "the qualified interest having been obtained under a written agreement could not be proved except by the production of that agreement duly stamped." The argument on the other side was "that the existence of some kind of interest having been established the precise nature of it or the terms upon which it was acquired were immaterial to the support of this action." Best C.J. in delivering judgment says: "If this had been a case between Kitchen and the plaintiff the agreement ought to have been produced, because that alone could decide the respective rights of those two parties; but it appears that Kitchen was to supply the plaintiff with furniture, and the question is whether, after he had obtained it, he had a sufficient interest to maintain this action. The case which has been referred to—*Sutton* v. *Buck* (2)—confirms what I had esteemed to be the law upon the subject, namely, that a simple bailee has a sufficient interest to sue in trover." By holding, therefore, that the agreement defining the conditions of the plaintiffs' interest was immaterial the Court in effect decided that the right of the bailee, in

(1) 2 Bing. 173; 27 R. R. 578. (2) 2 Taunt. 302; 11 R. R. 585.

possession, to sue could not depend upon the fact or extent of his liability over to the bailor, since the plaintiff was allowed to keep his verdict in trover, the agreement defining his interest and liability being excluded from the discussion. In *Sutton* v. *Buck* (1), on the authority of which this case was decided, it was held that possession under a general bailment is sufficient title for the plaintiff in trover. The plaintiff had taken possession of a stranded ship under a transfer void for non-compliance with the Register Acts, and he sued the defendant in trover for portions of the timber, wood, and materials of which the defendant had wrongfully taken possession. Sir James Mansfield C.J. had non-suited the plaintiff, on the ground that the transfer was defective without registration. On motion the non-suit was set aside, Sir James Mansfield being a member of the Court, and a new trial ordered on the ground that the plaintiff had sufficient possession to maintain the action against the wrongdoer. It is true that Chambre J. reserved his opinion as to the measure of damages, but on the new trial the plaintiff recovered a verdict apparently for the full value of the things converted, and on further motion for a new trial the only point argued was that the defendant was justified as lord of the manor in doing what he did—a contention which was rejected by the Court.

In *Swire* v. *Leach* (2) a pawnbroker, whose landlord had wrongfully taken in distress pledges in the custody of the pawnbroker, was held entitled to recover in an action against the landlord for conversion the full value of the pledges. This case was decided by a strong Court, consisting of Erle C.J., Williams and Keating JJ., and has never, so far as I know, been questioned since. The duty of the bailee to account to the bailor was recognised as well established. See also *Turner* v. *Hardcastle* (3), a considered judgment of the Court of Common Pleas, which included Willes J., who had not been a party to *Swire* v. *Leach* (2), and where the bailee's right to recover full damages and his obligation to account to the bailor is again affirmed.

(1) 2 Taunt. 302; 11 R. R. 585. (2) 18 C. B. (N.S.) 479.
(3) 11 C. B. (N.S.) 683.

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The ground of the decision in *Claridge's Case* (1) was that the plaintiff in that case, being under no liability to his bailor, could recover no damages, and though for the reasons I have already given I think this position is untenable, it is necessary to follow it out a little further. There is no doubt that the reason given in *Heydon and Smith's Case* (2)—and itself drawn from the Year Books—has been repeated in many subsequent cases. The words are these: "Clearly, the bailee, or he who hath a special property, shall have a general action of trespass against a stranger, and shall recover all in damages because that he is chargeable over."

It is now well established that the bailee is accountable, as stated in the passage cited and repeated in many subsequent cases. But whether the obligation to account was a condition of his right to sue, or only an incident arising upon his recovery of damages, is a very different question, though it was easy to confound one view with the other.

Holmes C.J. in his admirable lectures on the Common Law, in the chapter devoted to bailments, traces the origin of the bailee's right to sue and recover the whole value of chattels converted, and arrives at the clear conclusion that the bailee's obligation to account arose from the fact that he was originally the only person who could sue, though afterwards by an extension, not perhaps quite logical, the right to sue was conceded to the bailor also. He says at p. 167: "At first the bailee was answerable to the owner because he was the only person who could sue; now it was said he could sue because he was answerable to the owner." And again at p. 170: "The inverted explanation of Beaumanoir will be remembered, that the bailee could sue because he was answerable over, in place of the original rule that he was answerable over so strictly because only he could sue." This inversion, as he points out, is traceable through the Year Books, and has survived into modern times, though, as he shews, it has not been acted upon. Pollock and Maitland's History of English Law, vol. 2, p. 170, puts the position thus:—"Perhaps we come nearest to historical truth if we say that between the two old rules there was no logical priority. The

(1) [1892] 1 Q. B. 422. (2) 13 Rep. 69.

bailee had the action because he was liable, and was liable because he had the action." It may be that in early times the obligation of the bailee to the bailor was absolute, that is to say, he was an insurer. But long after the decision of *Coggs* v. *Bernard* (1), which classified the obligations of bailees, the bailee has, nevertheless, been allowed to recover full damages against a wrongdoer, where the facts would have afforded a complete answer for him against his bailor. The cases above cited are instances of this. In each of them the bailee would have had a good answer to an action by his bailor; for in none of them was it suggested that the act of the wrongdoer was traceable to negligence on the part of the bailee. I think, therefore, that the statement drawn, as I have said, from the Year Books may be explained, as Holmes C.J. explains it, but whether that be the true view of it or not, it is clear that it has not been treated as law in our Courts. Upon this, before the decision in *Claridge's Case* (2), there was a strong body of opinion in text-books, English and American, in favour of the bailee's unqualified right to sue the wrongdoer: see Mayne on Damages, 4th ed. p. 381, and cases there cited; Sedgwick on Damages, 7th ed. vol. 1, p. 61, n. (*a*); Story on Bailments, 9th ed. s. 352; Kent's Commentaries, 12th ed. vol. 2, p. 568, n. (*e*); Pollock on Torts, 6th ed. pp. 354, 355; Addison on Torts, 7th ed. p. 523; and as I have already pointed out, Williams J., the editor of Williams' Saunders, was a party to the decision of *Swire* v. *Leach*. (3) The bailee's right to recover has been affirmed in several American cases entirely without reference to the extent of the bailee's liability to the bailor for the tort, though his obligation to account is admitted —see them referred to in the passages cited, and in particular see *Ullman* v. *Barnard* (4); *Parish* v. *Wheeler* (5); *White* v. *Webb*. (6) The case of *Rooth* v. *Wilson* (7) is a clear authority that the right of the bailee in possession to recover against a wrongdoer is the same in an action on the case as in

(1) (1704) 2 Ld. Raym. 909.
(2) [1892] 1 Q. B. 422.
(3) 18 C. B. (N.S.) 479. [See also Mr. Justice Wright in Pollock and Wright on Possession, p. 166.]
(4) (1856) 73 Mass. Rep. 554.
(5) (1860) 22 New York Rep. 494.
(6) 15 Conn. Rep. 302.
(7) 1 B. & A. 59.

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an action of trover, if indeed authority were required for what seems obvious in point of principle. There the gratuitous bailee of a horse was held entitled to recover the full value of the horse in an action on the case against a defendant by whose negligence the horse fell and was killed. The case was decided by Lord Ellenborough C.J., Bayley, Abbott, and Holroyd JJ. The three latter seem to me to put it wholly on the ground that the plaintiff was in possession and the defendant a wrongdoer. Abbott J. says shortly:—"I think that the same possession which would enable the plaintiff to maintain trespass would enable him to maintain this action"; and Bayley J. points out that case is a possessory action. But Lord Ellenborough undoubtedly rests his judgment on the view that the plaintiff would himself have been responsible in damages to his bailor to a commensurate amount. This, no doubt, was his personal view, but it was not the decision of the Court, and, as I have pointed out, it has certainly not been acted upon in subsequent cases. Therefore, as I said at the outset, and as I think I have now shewn by authority, the root principle of the whole discussion is that, as against a wrongdoer, possession is title. The chattel that has been converted or damaged is deemed to be the chattel of the possessor and of no other, and therefore its loss or deterioration is his loss, and to him, if he demands it, it must be recouped. His obligation to account to the bailor is really not ad rem in the discussion. It only comes in after he has carried his legal position to its logical consequence against a wrongdoer, and serves to soothe a mind disconcerted by the notion that a person who is not himself the complete owner should be entitled to receive back the full value of the chattel converted or destroyed. There is no inconsistency between the two positions; the one is the complement of the other. As between bailee and stranger possession gives title—that is, not a limited interest, but absolute and complete ownership, and he is entitled to receive back a complete equivalent for the whole loss or deterioration of the thing itself. As between bailor and bailee the real interests of each must be inquired into, and, as the bailee has to account for the thing bailed, so he must account for that which has become its

equivalent and now represents it. What he has received above his own interest he has received to the use of his bailor. The wrongdoer, having once paid full damages to the bailee, has an answer to any action by the bailor. See Com. Dig. Trespass B. 4, citing Roll. 551, l. 31, 569, l. 22, Story on Bailments, 9th ed. s. 352, and the numerous authorities there cited.

The liability by the bailee to account is also well established —see the passage from Lord Coke, and the cases cited in the earlier part of this judgment—and therefore it seems to me that there is no such preponderance of convenience in favour of limiting the right of the bailee as to make it desirable, much less obligatory, upon us to modify the law as it rested upon the authorities antecedent to *Claridge's Case*. (1) I am aware that in two able text-books, Beven's Negligence in Law and Clerk and Lindsell on Torts, the decision in *Claridge's Case* (1) is approved, though it is there pointed out that the authorities bearing the other way were not fully considered. The reasons, however, which they give for their opinions seem to be largely based upon the supposed inconvenience of the opposite view; nor are the arguments by which they distinguish the position of bailees from that of other possessors to my mind satisfactory. *Claridge's Case* (1) was treated as open to question by the late Master of the Rolls in *Meux* v. *Great Eastern Ry. Co.* (2), and, with the greatest deference to the eminent judges who decided it, it seems to me that it cannot be supported. It seems to have been argued before them upon very scanty materials. Before us the whole subject has been elaborately discussed, and all, or nearly all, the authorities brought before us in historical sequence.

STIRLING and MATHEW L.JJ. concurred.

Appeal allowed.

On the question of costs *The Empusa* (3) was cited by counsel for the owners of the *Winkfield*, and *The Black Prince* (4) by counsel for the Postmaster-General.

(1) [1892] 1 Q. B. 422.
(2) [1895] 2 Q. B. 387.
(3) (1879) 5 P. D. 6.
(4) (1862) Lush. 568.

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Dec. 19. The case was mentioned again on this question.

COLLINS M.R. The costs of the appeal of the Postmaster-General must be paid by the respondents. No order as to costs in respect of the owners of the *Mexican* or of the *Winkfield*. The costs in the Court below will be dealt with by the President. (1)

Solicitor for appellant, the Postmaster-General: *Solicitor to the Post Office.*

Solicitors for respondents, owners of cargo on the *Mexican*, and for the owners of the *Winkfield*: *Thomas Cooper & Co.*

Solicitors for the owners of the *Mexican*: *Botterell & Roche.*

T. L. M.

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Nov. 13, 25.

BIRCH *v.* BIRCH AND OTHERS.

Probate—Action for Revocation on Ground of Fraud—Staying Proceedings—Res Judicata — Person charged with Fraud not a Party to former Proceedings.

If any person who is interested, directly or indirectly, in the establishment of a testamentary document is guilty of a fraud in putting forward that document for probate, this fraud affects the whole litigation. Where, therefore, the plaintiff, in an action against executors, claimed, on the ground of fraud, to revoke a probate granted in solemn form, and the defendants moved to dismiss the action as res judicata, the Court refused to stay the proceedings, although it was not suggested that the executors, to whom probate had been granted, were cognizant of the alleged fraud, and although the person, against whom the plaintiff now made the charges, was not a party to the former suit.

MOTION by defendants in a probate action to stay the proceedings and dismiss the action as being res judicata.

The plaintiff was defendant in a former suit, in which the will, probate of which he now sought to revoke, was decreed to have been proved in solemn form of law.

The ground of revocation relied upon by the plaintiff was fraud, which he imputed to a person who was instrumental in obtaining the will, but who was not a party to the former

(1) The President subsequently directed that each party should bear his own costs.

proceedings. The wife of the person now charged with fraud was a beneficiary under the will and a party to those proceedings.

The material facts and dates appear in the judgment.

Bargrave Deane, K.C., and *R. H. Pritchard*, for some of the defendants. This is not the proper tribunal to deal with the present application, which is practically for the revocation of the probate in solemn form granted by the President: *Flower* v. *Lloyd.* (1) If the persons here charged have been guilty of the offences alleged, they ought to be proceeded against in a criminal court. There might be some ground for the application if either of the persons charged had been a party to the former proceedings in this Court. The plaintiff, if he wishes to obtain redress in a civil court, should go to the Chancery Division, as was done in *Priestman* v. *Thomas* (2), and in the earlier case of *Barnsly* v. *Powel.* (3)

[GORELL BARNES J. This is a branch of the High Court now equally with the Chancery Division.]

Inderwick, K.C., and *Willock*, for Walter George Birch, the plaintiff. The plaintiff after the decision in the former suit could not appeal to the Court of Appeal, for he was not in a position to impeach the judgment of the President upon the evidence before him. It is not alleged that the two executors were parties to any fraud, but the plaintiff will contend that the case innocently put forward by them at the hearing was in fact procured by fraud. That is the substance of the statement of claim, which can be verified by affidavit if the Court desires. The reason for bringing the action in this Court is that all the documents are here.

[GORELL BARNES J. There is nothing at the present day in the point that this is not the right Court.]

This action is clearly maintainable: *Flower* v. *Lloyd* (1); *Cole* v. *Langford* (4), in which *Priestman* v. *Thomas* (2) was referred to; *Wyatt* v. *Palmer.* (5) The person chiefly implicated in the fraud is interested in the property passing

(1) (1877) 6 Ch. D. 297; (1878, 1879) 10 Ch. D. 327.
(2) (1884) 9 P. D. 70, 210.
(3) (1749) 1 Ves. Sen. 287.
(4) [1898] 2 Q. B. 36.
(5) [1899] 2 Q. B. 106.

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under the will, through benefits derived by his wife. The case should be allowed to proceed, and this motion should be dismissed.

Bargrave Deane, K.C., in reply. There is no authority for putting innocent parties to the expense and trouble of again contesting an action which has been decided, and the judgment in which has not been appealed against. The executors are a brother and sister of the deceased. To allow this action to proceed would be going beyond any reported case.

Whitmore L. Richards, for three other defendants. The action is misconceived. Order XXXIX. provides for procedure by motion in the Court of Appeal on discovery of new facts. The plaintiff's statement of claim shews that he relies on new facts which have come to his knowledge. The Court of Appeal always enlarges the time for appealing upon good cause shewn. *Young* v. *Kershaw* (1) was a stronger case than this, because it dealt with the alleged perjury of one of the parties; and the test applied was whether the evidence suggested to be then available would have been conclusive if it had been adduced at the trial. In the present case, if the plaintiff is allowed to proceed, and if he can and does produce evidence in support of the allegations in his statement of claim, it will, at the best, be only oath against oath, and, therefore, inconclusive.

Cur. adv. vult.

Dec. 5. GORELL BARNES J. This is a motion, made on behalf of the defendants, that this action, which is between Walter George Birch, the plaintiff, and Edwin Birch and Amy Birch, the defendants, may be dismissed on the ground that the matter thereof has already been heard and adjudicated upon; and also, in the course of the argument, it was suggested that the plaintiff was not able to shew any primâ facie case for bringing this action. It is necessary, in order to deal with those two points, to refer with some little particularity to the facts that give rise to the action in order to understand how the matter arises.

(1) (1899) 81 L. T. 531.

It appears that there were two actions brought in this Court, the first on December 12, 1899, by Ada Rosa Guise, a married woman, against Edwin Birch, Walter George Birch, Jesse Joseph Birch, Charles Birch, and Henry Birch; and the other on December 16, 1899, between Edwin Birch, Jesse Joseph Birch, and Amy Birch, as plaintiffs, and Walter George Birch, the present plaintiff, as defendant; and those actions were consolidated.

It further appears that on June 14, 1899, letters of administration to the estate of Arthur Birch, who died on April 18, 1899, were granted to Walter George Birch, Edwin Birch, and Jesse Joseph Birch; and the plaintiffs in the first-named suit claimed revocation of those letters and propounded a will of—according to the writ—December 8, 1897. I am not sure if that is meant for the 8th, but at any rate that is the way it stands in the writ. The plaintiffs in the second suit claimed revocation and propounded a will of December 18, and, in the alternative, probate of certain instructions of December 8, which are perhaps those referred to in the first writ.

By her pleading, in the form of an answer delivered on February 20, 1900, Ada Rosa Guise supported the claim in the second suit for the revocation of the letters and propounded the will of December 18, and, alternatively, the instructions to which I have referred. Mr. Walter George Birch pleaded as to both of these documents that they were not executed in accordance with the provisions of the statute, and that they were not signed by the deceased or by any one at his direction. The plaintiffs in the second action, by their reply, traversed this defence.

The case which was raised in the consolidated action was tried before the President on June 22, 1900; and he found for the will of December 18, and ordered the letters of administration to be revoked.

The witnesses to the document of December 18 were not called, and it was said, as I understand, that they could not be found; but among the witnesses called at the hearing was Henry Guise, the husband of Ada Rosa Guise. I am not, of course, going into the details of it, but his evidence, a short-

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hand note of which has been supplied to me, was to the effect, among other matters, that in searching for the other witnesses he found a certain man who it was alleged was a witness with two others to the instructions of December 8, and whom Mr. Guise said he had not known before.

I am not dealing with the names now because they are not before the Court, but the evidence is as follows:—

"*Q.* Had you ever known this man before that in your life?—*A.* No; I had never known him before; I never saw him before to my knowledge; I may have passed him in the street.

"*Q.* Or spoken to him?—*A.* I had never spoken to him before; I had no previous knowledge whatever of him." This man was also called as a witness, and he said in answer to this question, "Had you seen Mr. Guise before?" (that is, I think, before the time when Mr. Guise said he had discovered him while searching for the other witness).—"*A.* Never before; I had never seen him before."

Now, as I said, Mr. Guise had married Mrs. Ada Rosa Guise, who I understand was a sister of the testator, and appears to be benefited by this will. He appears from his evidence to have been acting on her behalf in his inquiries with regard to these documents.

He says—"*Q.* What did you go to see him for?" (that, I think, is the solicitor).—"*A.* Well, to find out whatever was being done, and generally what the result was. I heard that there was an intestacy, and, of course, I went to see if letters of administration were going on, or something of that kind—really to look after things in my wife's interests."

Mr. Guise was also executor under the will of his wife's sister Catherine, who had by her will appointed his wife as residuary legatee.

The testator in his will of December 18 forgave his brothers and sisters their debts; and I understand there was a debt due from this Catherine of 160*l.*, and Catherine would, as far as I can understand, have perhaps taken a share in the testator's estate if she had survived him; but there appears to be a point on the documents as to whether, if she died before

him, her share would not, after certain deductions, go to her sister Ada.

Now, as I said, on June 22, 1900, the suit was heard before the President; and on June 26 of the present year this action was begun by a writ issued on behalf of Walter George Birch against Edwin Birch and Amy Birch, and in that writ the plaintiff claimed as heir-at-law and one of the next of kin of Arthur Birch, the testator, late of Mitcham, in the county of Surrey, who died on April 18, 1899, intestate, to have the probate of the will of December 18, 1897, revoked. This writ is issued against the two defendants as executors, who had obtained probate of the will. Thereupon this motion was made on July 10, as I have stated, to dismiss the action on the ground referred to in the notice of motion.

I am informed that the motion was first adjourned in order that a statement of claim should be delivered shewing what the case presented on the part of the plaintiff was, and the statement of claim was subsequently delivered on July 29, 1901. The claim in it varies from that which is indorsed on the writ, because the writ only claimed revocation of probate.

The claim in the statement of claim, which appears to be treated as amending the claim in the action, is to set aside the judgment, and the pleading states first of all the position of the plaintiff, and then the judgment of the President, and then it goes on to say that the said judgment was obtained against the plaintiff by the fraud of three persons and Henry Guise, the husband of Ada Rosa Guise, one of the plaintiffs in the said consolidated action; and it alleges that in July, 1899, one of the said three persons, at the instigation of and in conjunction with the said Henry Guise, drew up and forged the pretended will dated December 18, 1897; and that the same person, in pursuance of the said fraud and at the expense of the said Henry Guise, went to Baltimore, United States of America, and from there wrote a letter dated August 28, 1899, falsely describing the circumstances under which the said pretended will was executed; and then in paragraph 5 it goes on to say, that "in September, 1899, in further pursuance of the said fraud, the said person drew up and forged a document

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purporting to be a will executed by the said deceased on December 8, 1897, and that the same person was instigated to draw up and forge the said document dated December 8, 1897, by another of the said three persons acting on behalf of, and as the agent of, the said Henry Guise."

Then it is alleged that the said three persons fraudulently signed the said document as attesting witnesses to the due execution thereof by the said deceased, and further, that "in pursuance of the said fraud, the said Henry Guise and the" other man called as a witness "falsely represented upon oath to the Court that they were strangers to, and unacquainted with, each other prior to on or about the 29th July, 1899; and, in further pursuance of the said fraud, concealed from the Court the fact that one of the men named had been in personal communication with another between the 13th July, 1899, and the 15th November, 1899." And then it claims that the judgment should be set aside.

The motion then came on again before me, and on that occasion I thought it desirable that it should be adjourned until the position of the plaintiff and the claim that he makes were stated in an affidavit; because, of course, it is one thing merely to launch a statement of claim, and another thing to shew, by affidavit, that there is foundation for what is asserted in the statement of claim. Thereupon the plaintiff, Mr. Walter George Birch, filed the affidavit sworn on November 22, 1901, one or two paragraphs of which it is necessary to refer to to explain how the matter stands.

In paragraph 3 he says that on the death of Arthur Birch no will was discovered, and it was believed that he had died intestate, and "letters of administration of his personal estate and effects were on the 14th of June, 1899, granted out of the Principal Probate Registry to me Walter George Birch and the defendants Edwin Birch and Jesse Joseph Birch. (4.) On the 13th July, 1899, an anonymous letter was received by post by Mr. Thomas P. McKie Sharp, of 45, Parliament Street, Westminster, who was then acting as solicitor to the said administrators of Arthur Birch, inclosing a document which purported to be a will of the said deceased dated the 18th December,

1897. Subsequently, about the end of November, 1899, a further document dated 8th December, 1897, purporting to be instructions for the will of the said Arthur Birch, and to have been duly executed by him in the presence of"—these three persons I have referred to—" was received by the said Thomas P. McKie Sharp, inclosed in a letter from"—one of them. Then he proceeds, in the affidavit, to describe the contest and and opposition in the case and what had taken place, and then in the 7th paragraph of the affidavit he says, " that in or about the month of October, 1900, and subsequently to the said decree"—that is, the decree of the President—a certain " communication was received by the authorities at Scotland Yard from " a person in San Francisco, inclosing a communication or statement, which is referred to in the 8th paragraph of the affidavit, and alleged to be a confession by one of these men as to the circumstances under which it is now alleged that the two documents were not genuine documents at all. Then, in the 9th paragraph of the affidavit, there is this statement: " Originals of the said letter and of the said confession are, as I am informed and believe, in the hands of the Commissioner of the Police, and investigations have been, and still are being, made with reference to these documents by the authorities at Scotland Yard; and it is upon information and evidence collected and obtained both by the said authorities and by my solicitor that I have commenced this action and delivered my statement of claim, the contents of which I am informed and verily believe are true." In paragraph 11 he says: " In consequence of statements made in the said confession, I have caused inquiries to be made, and am now able to prove conclusively that the said Henry Guise was, prior to the 23rd day of July, 1899, well acquainted with" the person I have referred to and who was called as a witness. Then, later on in the affidavit, he proceeds to state the position of Mr. Henry Guise as executor of the will of Catherine Birch, and suggests also that Mr. Guise should be added as a defendant, and an application to add him as defendant was made to me in the course of the hearing of this motion. Now that affidavit, as far as it goes, purports to state that the allegations in

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the statement of claim are true, and gives reasons for so saying.

The points made in argument are these: It is said by Mr. Deane, for the defendants, that a suit to remove the decree will not lie, and a certain number of cases were cited upon that point with the object of making out that a suit of this character could not be maintained. I have examined these authorities, and I do not propose to go at any length into them, because I am satisfied, after a careful consideration of the matter, that a suit of this character can be maintained. I think that is perfectly clear after one or two references which I will give. First of all, it is stated in Mitford on Pleadings, 5th ed. p. 112: "If a decree has been obtained by fraud, it may be impeached by original bill without the leave of the Court"; and, in an early case before the Lord Chancellor in 1749 of *Barnsly* v. *Powel* (1), the details of which it is not necessary that I should go through, there is a marginal note which sums up the substance of the judgment, and which is in a form convenient for my purpose. It is in these terms: "Probate obtained by fraud"—this is distinguishing between a fraud on the testator, which is a matter triable in the course of proving a will, and a fraud on the next of kin—"Probate obtained by fraud relieved against here"—that is, in the Court of Chancery—"and the deed importing a consent thereto set aside here, not in Ecclesiastical Court; and the defendant decreed to consent to a revocation of the probate." That form of machinery is not necessary now, because the courts have all been amalgamated, so that a suit lies in the High Court, and it is easier to bring it in this branch for the purpose of obtaining the relief which is indicated in that case. Then, again, in the case of *Wyatt* v. *Palmer* (2), Lindley M.R. said this (3): ". . . . Thereupon the plaintiff brings an action to impeach that judgment on the ground that it was obtained by fraud. It is said that no such action will lie. That proposition is so new to me that, as an equity lawyer, I was startled by it. That an action could not be brought to impeach a decree or judgment on the ground of fraud was a

(1) 1 Ves. Sen. 287. (2) [1899] 2 Q. B. 106.
(3) [1899] 2 Q. B. at p. 109.

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surprise to me. I was familiar with such actions when at the bar, and I have refreshed my memory by referring to Mitford on Pleadings, where I find this"—then he reads the passage to which I have referred, and continues: "Why should not a judgment by default be so impeached? Suppose a man was induced by fraud not to appear, and by that means judgment was obtained against him, I am not prepared to say that, because there is a summary method of impeaching that judgment provided by the rules, recourse cannot be had to the old method of impeaching the judgment by action. The old jurisdiction of the Court is not touched or taken away by the rule in question." One of the cases which was referred to by Mr. Deane of *Priestman* v. *Thomas* (1), when carefully examined, is really an authority against his contention, and not an authority in its favour. Therefore, I am of opinion that such a suit as this can be maintained where the decree is alleged to have been obtained by fraud.

Then it is said—and this is another point which requires careful consideration—that that can only be done where the parties to the suit have been guilty of fraud, and it is pointed out that there is not any suggestion made by the plaintiff of improper conduct of any kind against any party to the suit. That appears to be so. The only fraud that is charged in the statement of claim is the alleged fraud against Mr. Henry Guise and the persons who are said to have worked with him. The point has, therefore, to be considered whether a suit of this character can be maintained in a case where no party to the old suit is in any way suggested to have been guilty of any improper conduct or fraud.

No doubt in many cases the point would be good; because, speaking of a very large section of cases, it is only the parties to those cases who would be in any way benefited by the judgment obtained. But this is certainly not so in probate cases. There is a considerable distinction between those cases and these, and the reason is this—that in probate cases many persons who are not parties to the suit are bound by the decree in it. The principle on which that proceeds is fully explained

(1) 9 P. D. 70, 210.

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by Lord Penzance in the case of *Wytcherley* v. *Andrews* (1), and, without going through the details of that judgment, it is substantially this—that a probate suit may be maintained by one or more persons for the benefit of all who are interested under the documents which are propounded, or it may be maintained against one or more persons for the purpose of getting rid of those documents or otherwise dealing with the case; and it follows that a number of persons may be interested in the proceedings who are not directly brought before the Court; if those persons have notice of the proceedings, and are aware that they are going on, so that they have the opportunity of coming in and intervening, then it is only reasonable that they should not, in the nature of this class of case, be allowed afterwards to come forward and question what has been decided, when they have had the opportunity of taking part in the proceedings before they came to a conclusion. It seems to me to follow from that that if some one who is interested in the establishment of a testamentary document is guilty of a fraud in propounding that document, it affects the whole litigation, because one may conceive this class of case: If a will were put forward by some one who took the whole beneficial interest in it—I am taking a hypothetical case, of course—if it were a document forged by that person in his own interests and naming two respectable executors, if that person were to procure witnesses to attest it or to pretend to attest it, and then to place the document in an innocent way before the executors, they might apparently be led by the circumstances to take up the case and propound the document. They would have witnesses provided, and in all innocency they might propound, and succeed in propounding, that document for the benefit of the person who was the originator and creator of the document. That seems to me to shew that in such a case it would be quite out of the question to say that because the parties—the executors—were perfectly innocent, that the document should be allowed to stand when the substantial interest was that of the person who had procured and forged the fraudulent document. I cannot myself see any substantial distinction between

(1) (1871) L. R. 2 P. & M. 327, at p. 328.

the case of one person being benefited and one of a number being benefited, who takes a similar course and acts in a similar way; and so it seems to me, if a document of a testamentary character were to be put forward by persons who are all innocent except one who had procured it and fraudulently set it forward in ways that could be done, that a suit could be maintained just as much as if it had been a judgment obtained by the fraud of all the parties to the judgment. Now, that leads me to the facts connected with Mr. Guise. It is clear that he had, in a sense, an interest in these proceedings. As the executor of Catherine, who made a will in favour of her sister, his wife, he was a party to a Chancery suit in which it is stated in the plaintiff's affidavit that he swore an affidavit in which he submits for the decision of the Court a question, "Whether or not, upon the true construction of the will of the said testator, Arthur Birch, and in the events which have happened, a certain debt of 160*l*., with any and what interest thereon, is now due and owing to the said defendants Edwin Birch and Amy Birch (as executors of the will of the said testator Arthur Birch) by him the said Henry Guise (as executor of the said will of the said Catherine Birch) or by his wife the said Ada Rosa Guise (as the sole legatee under the said will of the said Catherine Birch)." Mr. Guise is a party to that suit, and, as I have already pointed out, he was, according to the passage I have read from his evidence, acting in his wife's interests in the inquiries and search which he was making at the time when this will is said to have been discovered, and, no doubt, if the matters were left to him to deal with for her benefit, though she was perfectly innocent, as it is not alleged she was not, it seems to me she would be affected by his action, on the assumption that all this allegation is true. Now, however, it is said that it would be very hard on the other parties to this suit if a fraud were to be established against one person, and they are made to litigate in consequence of matters which they have not had anything to do with.

But, on the assumption that these allegations of fraud can be established, they would not be entitled to benefit by the

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fraud, and they would be endeavouring to retain the benefit of that which had no foundation. Lastly, it is said that no real case of any kind is shewn upon this affidavit. Of course, I cannot try that question. It may be—and I must be understood as not expressing the slightest opinion, or having the slightest desire to express any opinion, one way or the other on the merits of this matter—that there is absolutely nothing in it at all when it is investigated; but, on the other hand, there may be something in it if the plaintiff's contention is correct. All I can say is that it seems to me the plaintiff has sworn to the truth of these statements in his behalf, and that he has made such averments in his affidavit as would not entitle me to say that no foundation whatever has been laid for promoting and prosecuting this case.

I have come to the conclusion on the whole, after considerable examination, both of the authorities and of the papers put before me, that—unfortunately it may be—this case must be allowed to proceed, and that, therefore, the motion which has been made must be refused; but I think the costs of the motion ought to be reserved in order to see what ultimately becomes of the case.

There is this further matter to deal with, and that is the application to add Mr. Henry Guise as defendant. I think that must be done on the application of the plaintiff under the circumstances of the case, and he will have to be served, and then he can come, if he chooses, and put forward any facts that would entitle this motion to be reopened.

It is a very unfortunate thing. I am told that this estate is not very large; but it appears to me that it is not shewn that this action is merely vexatious, and that I should not be entitled to accede to this motion, and, as I say, the motion must be refused.

Bargrave Deane, K.C. One never feels quite sure about these matters, whether this is a final order or an interlocutory order. I do not know that we shall appeal, but, if necessary, will your Lordship give us leave?

GORELL BARNES J. I think it is a case in which, certainly,

my views should not be final; and, if necessary, you can have leave. I think, though, if you examine the cases, you will find it difficult to get over them.

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Solicitors for defendants: *T. P. McKie Sharp.*
Solicitor for plaintiff: *E. Whitelock Reeves.*
Solicitor for three parties added: *J. W. Reid.*

H. D. G.

IN THE GOODS OF ALFRED READE.

1901
Dec. 16.

Probate—Wills—Codicils—Revocation—Revival.

In 1895 the testator executed a will and two codicils. In 1898 the same solicitor, who had prepared that will and the second codicil thereto, drew another will, which revoked "all wills, codicils, and testamentary dispositions" theretofore made by the testator. The three documents of 1895 were destroyed immediately after the execution of the will of 1898. In 1899 he executed a codicil which was expressly declared to be a codicil to the will of 1898, and which made some slight alterations in the disposition under that will of a portion of the residue. In 1900 a solicitor, who had prepared the first of the codicils in 1895, drew for the testator a codicil, described as a codicil to the will of the 10th day of January, 1895, and concluding with a confirmation of the said will "as altered by the codicils thereto." This last codicil made certain charitable bequests.

After the testator's death, in 1901, the will of 1898 and the two codicils of 1899 and 1900 were the only testamentary documents found among his papers.

Upon motion by the executors of the will of 1898 (three of whom were also named as executors in the will of 1895):—

The Court (Gorell Barnes J.) granted probate of the will of 1898 and codicils of 1899 and 1900, omitting from the last document the words of reference to the will of 1895.

Rogers v. *Goodenough*, (1862) 2 Sw. & Tr. 342, followed.

In the Goods of Chilcott, [1897] P. 223, distinguished.

MOTION for probate.

Alfred Reade, late of Salt Hill, Slough, in the county of Buckingham, died on October 15, 1901.

After his death, a will dated March 2, 1898, and two codicils dated respectively January 22, 1899, and July 20, 1900, were found in his despatch-box.

The codicil of July 20, 1900, purported "to be a codicil to my will dated the 10th day of January, 1895," and it was

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prepared by Mr. R. H. Barrett, solicitor, of Slough, who was aware that the testator had made the will of January 10, 1895, but was not aware of the fact that such will with two codicils thereto, made on June 25 and December 30, 1895, respectively, had been expressly revoked by the subsequent will of March 2, 1898, and he was even said to be unaware of the execution of the last-mentioned will, although at the end of the codicil of 1900 appeared the words, "in all other respects I confirm my said will as altered by the codicils thereto."

The will of 1895 and the codicil of December 30, 1895, had been prepared by Messrs. Farrer & Co., and were executed in duplicate, one part being retained by the deceased and the other part by Messrs. Farrer & Co.

The codicil of June 25, 1895, which was not in duplicate, was prepared by Mr. Barrett, and was retained by the deceased from the time of its execution until the month of October, 1895, when he gave it into the charge of Messrs. Farrer & Co. for safe custody.

It appeared that when Messrs. Farrer & Co. sent to the deceased the engrossment of the will of March 2, 1898, one of the clerks who attended with it handed to the deceased a letter from Mr. A. R. Farrer, strongly advising him to destroy his former will; and, from the clerk's recollection, and also from the fact that the earlier will was not found amongst the deceased's papers after his death, that will and the second codicil thereto, dated December 30, 1895, were believed to have been destroyed immediately after the execution of the later will. Messrs. Farrer & Co. thereupon destroyed the duplicates of those two documents, and also destroyed the original codicil of June 25, 1895.

The Court was now moved, on behalf of the executors, to grant probate of the will of March 2, 1898, and the two codicils of January 22, 1899, and July 20, 1900, but omitting from the latter codicil the words of reference to the will of 1895, namely, "dated the 10th day of January, 1895."

One member of the family was incapable of consenting. He, it was said, would get a slightly smaller share of the residue if the application were granted.

Priestley, for the executors. *In the Goods of Chilcott* (1) is distinguishable, because in that case the earlier will was in existence.

[GORELL BARNES J. Is not there some authority for saying that a testator cannot confirm a destroyed will?]

In the Goods of Steele (2) is the principal authority for that proposition. In the judgment (3) the earlier decision, *Rogers* v. *Goodenough* (4), is cited, and it is precisely in point here. There is no reported case impeaching those decisions. If the documents in the present case had been in existence, the Court would have been bound to decide against the applicants, following *In the Goods of Chilcott* (5), which followed *In the Goods of Stedham.* (6) [He also referred to *In the Goods of Isabella Gordon.* (7)]

GORELL BARNES J. It is quite clear that the last codicil does not disclose an intention to revoke the later of the two wills. I see no objection to leaving out the words of reference to the earlier will. It will then run, "Codicil to my will . . . ." Subject to that, I grant probate of the will of 1898 with the codicils of 1899 and 1900. That is sense, and apparently in accordance with the case of *Rogers* v. *Goodenough.* (4)

Solicitors: *Farrer & Co.*

(1) [1897] P. 223.
(2) (1868) L. R. 1 P. & M. 575.
(3) L. R. 1 P. & M. at p. 577.
(4) 2 Sw. & Tr. 342.
(5) [1897] P. 223.
(6) (1881) 6 P. D. 205.
(7) [1892] P. 228.

H. D. G.

1901
Nov. 11, 18.

BLOOD *v.* BLOOD.

Divorce—Variation of Settlements—Matrimonial Causes Act, 1859 (22 & 23 *Vict. c.* 61), *s.* 5—*Death of only Issue of dissolved Marriage—Vested Interest devolving on Respondent—Remarriage of Respondent and Fresh Settlement thereon—Extinguishment of all Respondent's Interests, including the Derivative Interest.*

Under s. 5 of the Matrimonial Causes Act, 1859, the Court has power to make, in favour of a petitioner, orders affecting settled property, even though the child or children of the marriage which has been dissolved attained a vested interest in the property.

MOTION upon registrar's report on petition to vary the settlement made on a marriage that had recently been dissolved.

The material facts appear in the arguments and judgment.

Priestley and *F. Russell*, for the petitioner. The short point is whether the property in question is settled property, and whether what the respondent has become entitled to on the death of his son is property derived by him otherwise than under the terms of the settlement, and cannot, consequently, be dealt with by the Court. The fact of the respondent's remarriage was not before the registrar. If the contention of the respondent is right, he has practically become entitled to this fund by reason of his own misconduct.

Inderwick, K.C., and *Barnard*, for the respondent. The respondent is absolutely entitled to these reversionary interests. Effect must be given to the last clause in the settlement. The only child of the marriage attained his majority on July 13, 1899, and thereupon took a vested interest. He might have sold or otherwise disposed of it. He died on July 16, 1900, unmarried and intestate. If he had died before he attained the age of twenty-one, the Court might have made an order affecting this property; but now the Court cannot deal with the guilty party except through the son, and through the son's estate, which has devolved upon the respondent, not by the terms of the settlement, but by operation of law.

There has been no case under s. 5 where the Court has

taken away the vested interest of a child under the marriage settlement of the parents. The only interest that the Court has power to extinguish here is the respondent's life interest under the settlement. The son took a vested interest in the whole fund, subject only to be divested by a remarriage, and by an appointment thereon of half the fund.

[GORELL BARNES J. I have often said the Court would not do it as a matter of discretion; but why do you say there is no power to do it?]

Crisp v. *Crisp* (1), followed by *Pocock* v. *Pocock and Barton* (2), and *Pollard* v. *Pollard* (3) are authorities against the power of the Court to vary the settlement.

Again, if the son were alive the Court would not extinguish his reversionary interest merely because his father has been guilty of adultery and some other matrimonial offence, and has on those grounds been divorced.

[GORELL BARNES J. Probably not.]

F. L. Wright, for the trustees of the settlement, said they did not seek to establish a lien as against the petitioner in case the Court should make the order she was now seeking; but, as there might be creditors of the son, the Court should at all events limit the order, if made, to so much of the beneficial interest of the son as passed to the respondent on the son's death.

Priestley, in reply, referred to *Meredyth* v. *Meredyth and Leigh* (4), and asked that a similar order be made in this case. He also referred to *Wigney* v. *Wigney*. (5)

Cur. adv. vult.

1901. Nov. 18. GORELL BARNES J. This is a motion upon the registrar's report on a petition to vary the settlement made on the marriage of the petitioner with the respondent. The registrar's report, after stating the facts, submits for the consideration of the Court: first, whether the interest of the respondent, derived as representative of his son, can be

(1) (1872) L. R. 2 P. & M. 426.
(2) (1868) 18 L. T. 338.
(3) [1894] P. 172.
(4) [1895] P. 92, at p. 94.
(5) (1882) 7 P. D. 228.

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extinguished; and, secondly, if so, whether the trustees have such a lien against the interests of the respondent, derivative or otherwise, as is claimed by them upon the authority of certain cases.

The latter point was not gone into here, and, as I underderstand, is not before me for consideration, the only point before me being that submitted by the registrar for the consideration of the Court, as to whether the interest of the respondent, derived as the representative of his son, can be extinguished. The decree nisi pronounced in this case on June 12, 1900, on the ground of the respondent's adultery and desertion, was made absolute on January 14, 1901. Under an ante-nuptial indenture of settlement dated July 25, 1877, certain property was brought into settlement by the petitioner in trust for herself for life, and on her death for the respondent for life if he should survive her, with certain conditional clauses, and with remainder to the children of the marriage. It was further provided that, if the petitioner should survive the respondent and marry again after his death, and if there should be only one child of the marriage, the petitioner should have power to appoint the income arising from a moiety of the trusts funds to her future husband, if he should survive her, for his life, and, after his death, to appoint the said moiety in favour of the children of such marriage.

The report, in stating the terms of the settlement, omits to state also that, in the event of there being no child of the marriage in question, the petitioner's interest in the settled property reverts to herself. The only child of the marriage attained the age of twenty-one, and died in July, 1900, at the age of twenty-two, a bachelor and intestate. He had, therefore, attained a vested interest under the settlement, and as his father, the respondent, survived him, he is, subject to the powers and interests conferred by the settlement, entitled to succeed to his son's estate, and to take a benefit which would ultimately have come to the son under the settlement. That is to say he would, unless something happens, become absolutely entitled in the end to the trust fund, subject to the power of appointment by the petitioner that I have referred to, in case

there was any remarriage after the respondent's death. I understand that the respondent has, since the date of the decree absolute, married again, and a settlement, dated May 22, 1901, was made by him on his second marriage. That settlement, as I understand, deals with property which would come to him as the representative of his deceased son, but "subject to any variation in the terms of the said settlement which may be made by the Court on the said petition" —that is the petition with which I am now concerned—"or otherwise."

The present application by the petitioner is that directions should be given that the property which was brought into settlement by her should be freed from the terms of the settlement; that the respondent's interests in it should be extinguished; and that the said property should be reconveyed to her on the principle that was applied in the case of *Meredyth* v. *Meredyth and Leigh*. (1) On the other hand, it is urged that the section under which the application is made gives the Court no power to make such an order, and it is contended that, as the words of the section do not give the Court power, there is no jurisdiction to make the order now asked for.

Let us see what the position is if the Court is not able to exercise that power. The marriage is dissolved. The petitioner has a life interest under the settlement. The child, to whom the property would go in remainder, subject to any power that the petitioner may have of appointment on a future marriage, is dead. The respondent has purported by this second settlement in May, 1901, made on his recent marriage, to settle the whole of this property, originally settled by the petitioner, on himself and his present wife and any children of his present marriage. So that the only interest which the petitioner has in the property which she herself brought into settlement is a life interest in that property, the whole of which, after her death, would pass away from herself and her family and go to the family of the respondent's present

(1) [1895] P. 92.

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marriage. That is an extraordinary state of things to contemplate, and it is one that I feel sure ought not to be allowed. The question is whether it can be prevented by the application of s. 5 of the Matrimonial Causes Act, 1859. The mere statement of the position shews the importance of the matter to the petitioner. I do not know what her age is; but it is obvious that she might want to marry again, and, on such remarriage, to resettle her property if she has power to do so. There is this observation to make, before dealing with the words of the section, that she has apparently certain powers which would come into operation after the death of the respondent, and with regard to that there would be no difficulty in giving her an acceleration of those powers, as was done quite recently in the case of *Whitton* v. *Whitton*, a proof of the report in which I have been furnished with. (1)

Now, I have considered the words of the 5th section of the Act with great care, and it appears to me that they do confer such a power as is contended for by the petitioner. Those words are extremely wide, and I am anxious that they should not, by any construction the Court may put upon them, be narrowed in any way. To narrow them would be undesirable for this reason: the various circumstances which come before the Court, and for which this section is brought into operation, are so diverse that it is to my mind extremely important that, so far as possible, the Court should have power to deal with all the cases that come before it, and, in dealing with them, to meet the justice of the case. I, therefore, do not desire to see any narrow interpretation placed upon the words of the section: *Hartopp* v. *Hartopp and Akhurst*. (2) I held, on the facts of that case, that a power could be exercised, though it might be said not to be for the benefit of the children of the marriage. Again, in the recent case of *Whitton* v. *Whitton* (1), I see, from the proof report supplied to me, that the President distinctly decided that the Court has power to vary a marriage settlement so as to deprive

(1) Now reported [1901] P. 348. (2) [1899] P. 65.

infant children of the marriage of part of their interests secured to them by such settlement. I think that, from one point of view, the order made in that case was not for the benefit of the children, though the President treats them as receiving a quid pro quo.

The recent authorities come to this: that the interests of children *may be* affected, though undoubtedly the general view expressed throughout the earlier cases would still prevail to this extent at least, that the Court will not affect those interests except, as I suggest, when it is found to be practically necessary or expedient that this should be done.

Now, in the present case, the child took a vested interest under the settlement, but did nothing to dispose of or charge that interest; and no one will be prejudiced by the order which I propose to make, except his father, the respondent, who took, by devolution on the child's death, the interest that the child became entitled to when he came of age. Now, if that position is looked at and the words of the section are looked at, it seems to me clear that there is power to do what is sought to be done here, and that no harm, on the one hand, can be done by acting on that view, whereas, on the other hand, the position of the petitioner, unless that is done, would be one which, as I have said, would be an extremely extraordinary one to contemplate. Therefore, I am of opinion that, under the terms of this section, I should make the order which the petitioner asks. I therefore direct that the respondent's interests in the settled property be extinguished, and that the trustees of the settlement be ordered to reconvey to the petitioner absolutely the corpus of the settled property, my intention being that the whole of the property which she brought into settlement shall be handed over to her for her absolute use and benefit. Under these circumstances it is not necessary to consider what the position might be under s. 32 of the earlier Act (20 & 21 Vict. c. 85).

F. L. Wright, for the trustees, pointed out that the son might have incurred debts, in respect of which there would have been no formal charge on the property.

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GORELL BARNES J. Liberty to apply as to that in chambers, and also as to the form of the order if you cannot all agree upon it. The costs of the trustees will be paid by the respondent. (1)

Solicitors for petitioner: *Valpy, Peckham & Chaplin.*
Solicitors for respondent: *C. Russell & Co.*
Solicitor for trustees: *Hugh Wharton.*

(1) The substantive portion of the order, as drawn up, and which was served on December 16, 1901, was in the following terms:—

". . . . It is ordered that the settlement dated July 25th, 1877, be varied by extinguishing all the rights, powers, and interests, including any derivative interest of the respondent in, concerning or over the whole or any part of the capital and income of the petitioner's settled funds, so that, with regard to the petitioner's settled funds, the settlement may in all respects be read as if the respondent were dead and had died in the lifetime of Edmond Maghlin Blood, the issue of the marriage. And it is further ordered that the trustees of the settlement convey and assign to the petitioner the whole of the petitioner's settled funds for her own absolute use and benefit, free from the trusts of the settlement, notwithstanding that the said Edmond Maghlin Blood took a vested interest therein, but subject and without prejudice to all incumbrances (if any) created by the said Edmond Maghlin Blood in respect of his interest therein. And it is further ordered that the respondent do pay the costs of the petitioner and the trustees of the settlement of and incidental to the proceedings for variation of settlement. Liberty to apply."

H. D. G.

WAUDBY *v.* WAUDBY AND BOWLAND.

1901
Nov. 27;
Dec. 6.

Divorce—Practice—Costs.

Upon a husband's petition for dissolution of marriage, no verdict was recorded upon the first trial, the jury being unable to agree upon some of the issues. On the second trial the jury found that the respondent and co-respondent had committed adultery, and that the petitioner had also committed adultery, but that the respondent had condoned it. The Court refused to grant the petitioner a decree and dismissed his petition; but, upon the questions raised as to costs:—

Held, that the wife was entitled to be paid by the petitioner her full costs of both trials; but

Held, further, that the petitioner was entitled to costs against the co-respondent in respect of the issue found against the latter, and that the order must cover the costs of that issue on both the trials.

Morgan v. *Morgan and Porter*, (1869) L. R. 1 P. & M. 644, and *Grosvenor* v. *Grosvenor*, (1885) 34 W. R. 140, commented upon.

THIS case raised questions as to costs in a husband's suit for dissolution of marriage, which resulted, first, in an abortive trial, and, finally, in the dismissal of the petition by reason of the petitioner's adultery.

The facts sufficiently appear hereafter.

Bargrave Deane, K.C., and *Rayden*, for the petitioner, asked for costs against the co-respondent in respect of the issue found against him: *Story* v. *Story and O'Connor*. (1)

Barnard, for the respondent, asked that she should be allowed her full costs of both trials to be paid by the petitioner. *Hurley* v. *Hurley and Menzies* (2) is an authority for giving her the full costs of the abortive trial, in which she practically succeeded, the petitioner having proved nothing against her.

Durley Grazebrook, for the co-respondent. The petitioner must have known from his advisers that he could not obtain a decree against his wife, having regard to the fact that he could not deny adultery with the person specifically named in the wife's answer. He did not claim damages, so that no relief was sought against the co-respondent. If a man persists

(1) (1887) 12 P. D. 196. (2) [1891] P. 367.

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in bringing a suit in which he must know that he cannot obtain relief, he ought to pay all the costs. At any rate, there should be no order for costs against the co-respondent. In *Story* v. *Story and O'Connor* (1) there was no argument as to costs; while in *Morgan* v. *Morgan and Porter* (2) and *Grosvenor* v. *Grosvenor* (3) there is nothing in the reports to shew that the co-respondent was condemned in costs.

Bargrave Deane, K.C., in reply. *Hurley* v. *Hurley and Menzies* (4) is distinguishable, as there the wife had obtained security beforehand for her costs of the trial in which the jury disagreed. *Story* v. *Story and O'Connor* (1) has been followed in other cases and should be followed here.

Cur. adv. vult.

Dec. 6. GORELL BARNES J. This was a divorce case tried before me. It lasted about a week, and the jury found that the respondent and co-respondent had committed adultery together, and that the petitioner had been guilty of adultery with a girl who was mentioned by name in the wife's pleadings, but that the wife had condoned this adultery.

The first question upon those findings is whether the petitioner's claim in his petition to have his marriage dissolved is one which commends itself to the discretion of the Court. I have considered the matter with the care that is always necessary in such cases, and I am of opinion that the authorities and the principles indicated therein do not entitle me to exercise my discretion in favour of the petitioner. The strongest cases reported against the exercise of this discretion are *McCord* v. *McCord, Ogle, and Coxon* (5), *Story* v. *Story and O'Connor* (1), and *Grosvenor* v. *Grosvenor*. (3) In face of those and other authorities, Mr. Deane felt that he could not press for the exercise of my discretion in favour of his client; and that is the right view to take, because although the petitioner said that the adultery was committed by him on one occasion only—a point upon which there may be a certain amount of

(1) 12 P. D. 196.
(2) L. R. 1 P. & M. 644.
(3) 34 W. R. 140.
(4) [1891] P. 367.
(5) (1875) L. R. 3 P. & M. 237.

doubt—the act, although condoned by the wife, was one of a very serious character, namely, the seduction of a servant girl in the house of the petitioner during the wife's temporary absence from home. The real questions remaining for consideration are the questions of costs, which raise points that require care in their determination. The facts, so far as they are material, are shortly these: The case was tried twice. On the first trial the findings of the jury were not formally recorded, as I understand that the President declined to accept them because they were incomplete. But one must look at this fact, I think, that the jury stated that they had agreed upon findings of cruelty and adultery against the petitioner, but that they were not agreed upon the question of condonation by the respondent, nor of adultery between the respondent and co-respondent. No application had been made on behalf of the respondent for payment or security of her costs in those proceedings; but, since that abortive trial, application has been made for security of her costs of the present trial, and I think a sum of 200*l.* was ordered to be paid into court or secured by the petitioner to meet these costs, as estimated by the registrar; so that there is no substantial question with regard to the costs of the trial before me, because an application was duly made to me in the course of the trial for an extension of the order for security; and, in consequence of the order and of that extension, the practical result is to give the wife her costs of the second trial. I think there is no substantial difference between saying that she is to have the "usual order" for her costs on this trial and giving her the costs of this trial.

As to the first trial, the respondent applied to the President, at or after the trial, to order that she should have her costs on the ground that there had been no finding against her, and that, therefore, she had substantially succeeded. The President declined to make any order on the ground, as it appears from the order itself, that the application was premature, she not having applied for any order for security. It now becomes my duty to deal with the costs of that trial and of the proceedings which led up to it. The position is that the wife was in a

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sense successful upon that trial: that is, no finding was arrived at against her. After considering this matter with some care and by the light of some authorities that I will refer to a little more in detail when I come to deal with the questions of costs regarding the co-respondent, I have come to the conclusion that the respondent is entitled to have her costs paid by the petitioner in respect of the abortive trial. There is one case I will refer to now, because it deals only with this question of wife's costs. In *Barnes* v. *Barnes and Beaumont* (1), which was a suit for dissolution of marriage tried before the Judge Ordinary and a special jury, the jury found that the respondent had committed adultery with the co-respondent, and that the petitioner also had committed adultery; but they declined to answer with whom or in what place, or whether or not it was with the knowledge and consent of the respondent. The co-respondent having obtained an order for a new trial, the Court signified that the petitioner might also have a new trial on the question of his adultery; but he refused it. The Court declined to exercise its discretion under 20 & 21 Vict. c. 85, s. 31, on the suggested ground that the evidence of the petitioner's adultery was insufficient and the verdict thereon unsatisfactory, and to make a decree nisi notwithstanding the verdict. I find that the Court afterwards determined that the respondent was entitled to her full costs against the petitioner, but refused to dismiss her from the suit until the proceedings between the petitioner and the co-respondent had been concluded.

The wife succeeded in the present case in defeating the petition of her husband at the first trial, and, if matters had rested where they were and the petitioner had not proceeded to a second trial, she must have had her full costs of the first trial. I can see no good reason why she should not have them now; and I accordingly make the order that the petitioner pay those costs. With regard to the co-respondent, he asks that at any rate there should be no order for costs against him, and there was a faint suggestion that he ought to have an order for his costs against the petitioner. The real point is whether any

(1) (1868) L. R. 1 P. & M. 572.

order for costs should be made against the co-respondent under the circumstances already stated. I find that in some cases where the petition has been dismissed, the co-respondent has been ordered to pay the costs of those issues upon which he failed. In *Bremner* v. *Bremner and Brett* (1), where, in the husband's suit for dissolution of marriage, the co-respondent was found guilty of adultery under such circumstances as would entitle the petitioner to the costs of that issue, it was held that the dismissal of the petition on the ground of the petitioner's adultery "does not *necessarily* disentitle him to such costs." Again, in *Story* v. *Story and O'Connor* (2), the petition was dismissed on a similar ground, but with costs against the co-respondent of those issues found against him. In *Morgan* v. *Morgan and Porter* (3), the position appears to have been somewhat different to that which is found in the report of the case. In the *Law Reports* it is merely reported upon the question of the exercise of the Court's discretion in granting or refusing a decree where the petitioner has once been guilty of adultery, and Lord Penzance points out that there must be special circumstances placing it in some category capable of distinct statement and recognition in order that the discretion may be fitly exercised in the petitioner's favour. From the original records of the case, which I caused to be looked up, a state of circumstances is disclosed which shews that the report is an incomplete record of the proceedings. It appears that certain findings were arrived at by the jury, and, amongst them, a finding that the petitioner had committed adultery with a certain woman mentioned by name in the pleadings, and that he had not committed adultery with any other woman (the report, in stating the pleadings and findings (3), being silent as to any counter-charge of adultery with any one besides the woman named); and it was upon that point that the case was reported, because I find that shortly afterwards the judge was asked to extend the time for applying for a new trial, and also was asked to grant a decree upon matters as they stood. He refused to grant a decree nisi at that time, but I find that

(1) (1864) 33 L. J. (P. & M.) 202.
(2) 12 P. D. 196.
(3) L. R. 1 P. & M. 644.

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he gave the wife the whole of her costs except of the one issue of adultery with the woman against whom the charge had failed—possibly because there was some special reason with regard to that charge—but he appears afterwards to have ordered a new trial. There was, in fact, a new trial with a special jury; and, before that trial took place, the wife obtained the full amount of costs secured, together with the balance of her taxed costs. Then, apparently, she and the co-respondent dropped the defence; because the record states that on February 10, 1870, the petitioner was heard through his counsel, the respondent and co-respondent not defending the suit, and that the jury then found that the petitioner had not committed adultery with the woman with whom he had, by the verdict of the first jury, been found guilty; and the co-respondent was condemned in the whole of the costs; so that the case, as reported, only deals with what took place after the first trial, and does not deal with what took place subsequently in the course of the case. I find, moreover, from the original record, that the decree nisi, which was pronounced after the verdict in the second trial, was ultimately made absolute, and the co-respondent was condemned in the amount of the petitioner's costs, as taxed.

The other case which was cited in argument before me was *Grosvenor* v. *Grosvenor* (1), the report of which also does not, I think, say anything about what order was made as to the costs. All that the reporter puts is that the petition was dismissed. I have, therefore, caused the original records of that case also to be looked up, and from these I find that, although the petition was dismissed, the respondent was allowed, as against the petitioner, all her costs—not merely the amount secured, but the balance of her costs when taxed—and the co-respondent, who did not appear and defend, but was called as a witness for the respondent, was condemned in the full costs of the suit. It does not, however, appear to have been pointed out to the judge that he ought not to have been condemned in the costs of those issues upon which the petitioner had failed.

In the present case I shall exercise my discretion by con-

(1) 34 W. R. 140.

demning the co-respondent in the costs of the issue upon which he has failed.

Durley Grazebrook submitted that the order should be limited to the costs of that issue on the second trial. The co-respondent, equally with the respondent, practically succeeded upon the first trial, the onus being upon the petitioner to establish the allegations made in his petition.

GORELL BARNES J. A co-respondent stands as to costs in quite a different position from a respondent (wife). My order must apply to both trials.

Solicitors for petitioner: *Iliffe, Henley & Sweet, for W. & K. E. T. Wilkinson, York.*

Solicitors for respondent: *Long & Gardiner, for F. H. Anderson, York.*

Solicitors for co-respondent: *Ridsdale & Son, for George Crombie & Sons, York.*

H. D. G.

1901
Dec. 4, 5, 6, 10, 19.

TWIST AND OTHERS *v.* TYE.

Probate—Practice—Costs—Executors.

Executors, who are also residuary legatees, are in the same position, as to costs, as any other party who unsuccessfully propounds a will.

Where executors, who were also named as residuary legatees, had ample opportunities of forming an opinion as to the testamentary capacity of the deceased, and, acting upon their opinion, propounded a will or wills, which, in the result, were pronounced against, after verdict of a jury, on the ground of testamentary incapacity and want of knowledge and approval of the contents:—

Held, that not only was this a case in which their costs should not be allowed out of the estate, but that, following the general rule that costs follow the event, they should pay the costs of the defendant; but not of any of the parties cited, whose interests were practically identical with those of the defendant.

Boughton v. *Knight*, (1873) L. R. 3 P. & M. 64, distinguished.

THESE were applications as to costs, following on a verdict and judgment against two wills propounded alternatively by the plaintiffs, who were the executors and trustees and residuary legatees therein named.

The facts, so far as material to these applications, are set out in the considered judgment of the Court.

Inderwick, K.C., *Sir Edward Clarke, K.C.*, and *Barnard*, for the plaintiffs, applied for costs out of the estate, or, alternatively, that they should not be condemned in the costs, the contention being that it was their duty to take the opinion of the Court and jury upon the last two wills.

[They cited *Boughton* v. *Knight*. (1)]

Hammond Chambers, K.C., and *Durley Grazebrook*, opposed both parts of the plaintiffs' application. *Boughton* v. *Knight* (1) is distinguishable. *Brown* v. *Fisher* (2) is in point. Executors, who are largely interested under the wills they propound, are in no better position as to costs than other litigants.

Kemp, K.C., and *J. B. Matthews*, for the heir-at-law, who, in the course of the trial, adopted the pleadings of the defendant,

(1) L. R. 3 P. & M. 64. (2) (1890) 63 L. T. 465.

referred to the Land Transfer Act, 1897, and cited *Rayson* v. *Parton* (1), and asked for costs.

R. H. Pritchard, and *Willock*, on behalf of various parties cited, who were interested under an intestacy, also asked for costs.

GORELL BARNES J. If the junior counsel for the plaintiffs and for the defendant will send me any other cases bearing on the question of costs, I will consider them.

Cur. adv. vult.

Dec. 19. GORELL BARNES J. This was a case, tried before myself and a special jury, in which the plaintiffs, as executors and trustees under the last will of the deceased, propounded that will which had been executed first as a document dated March 24, 1896, and, secondly, as a document of April 14, 1896.

The testatrix was an old woman of about ninety or ninety-one years of age at the time when these documents were made, and the questions were whether they were properly executed—about which there was really no dispute—whether they were executed when she was of sound mind, and whether she knew and approved the contents. The jury found due execution, but that the deceased was not of sound mind, memory, and understanding, and that she did not know and approve the contents.

These two documents, which I am treating for present purposes as one, left the residue of the deceased's property to Mr. Colmore, Mr. Bellamy, and Mr. Twist, the three plaintiffs; and the question which was argued and reserved was what ought to be done as to the costs of the litigation.

The plaintiffs who have failed contend that the costs ought to come out of the estate, or, at any rate, that there should be no order against them for costs. The defendant, on the other hand, contends that the law should take its ordinary course, and that the costs should follow the event.

The general rule is, of course, that costs, after a trial of this

(1) (1869) L. R. 2 P. & M. 38.

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character, should follow the event unless, according to the principles which are in force in this Court, there should be adequate reason for an order of a different character.

Speaking generally, there are in this Division two classes of cases in which there should be, and generally is, a departure from the ordinary rule: the first is where the litigation has been brought about through the conduct of the testator or testatrix; and the second is where the parties who have failed have reasonably been led into the litigation by a bonâ fide belief in their case, and have, therefore, felt it desirable to inquire into the testamentary dispositions of the testator or testatrix.

In order to determine this question of costs, the Court must look at the facts and view them as they were presented to the unsuccessful parties.

Mr. Colmore had been acting for some time as the solicitor for this old lady; Mr. Bellamy had, since 1890, been a trustee under some settlement in which she was interested; and Mr. Twist had also acted for her in a similar capacity since 1892. They were all fully aware of her circumstances and condition. Mr. Colmore knew about this residuary clause; Mr. Bellamy stated that he did not; and, with regard to Mr. Twist, I am not able to trace from my note whether he knew or did not know; but I think this is immaterial.

On March 5, 1896, the deceased's daughter died under circumstances which were detailed in the evidence, and there is no doubt that it had a large effect on this old lady's mind. Mr. Bellamy shortly afterwards, as he said at the request of the testatrix herself, made out a list of the relatives, and gave the list to Mr. Colmore.

On March 20 Mr. Colmore took instructions from the old lady for the purpose of making the will in question; but as he was to be a beneficiary he thought it desirable to hand over the instructions and particulars to his partner, Mr. Monckton, leaving him to act in drawing the will. Bellamy and Twist were at the solicitors' office on that occasion about the affairs of the deceased's daughter, who had left a will giving all her

property to her mother, the testatrix; but I think the evidence is that they did not remain in the room during the time the instructions were being given.

On March 24, 1896, the testatrix went again to the office, and the document of that date was executed. Before it was signed, Mr. Colmore was called in by Mr. Monckton to try and persuade the old lady that the will as drawn was in accordance with the instructions she had given in the first instance, because she was maintaining that some specific legacies had been introduced into it contrary to her instructions, and there was also some confusion in her mind as to the bequest "to Lucy and Lilly Iliffe," those not being really the names of the persons who were in the relationship which I think she must, if she were dealing properly with the matter, have had in her mind with regard to the legatees.

The document of March 24, 1896, having been somewhat altered and not being in ship-shape form, so to speak, the will was, on April 14, 1896, executed in the final form in which it now appears.

That is a short outline of the way in which the will came to be executed.

It appears that before March, 1896, the daughter had been looking after the old lady; and from the time of the daughter's death, so far as I can follow the evidence, the three residuary legatees looked after her affairs, and apparently consulted each other about the different matters which had to be dealt with for her general comfort and for the management of her affairs. Bellamy, for instance, filled up her cheques, though she appears to have put her name to them when that had been done. In addition to the fact, therefore, that these three gentlemen, the present plaintiffs, were cognizant of the state of affairs, and were managing those affairs at and about this time, certain documents were put in evidence in the course of the trial which had a material bearing upon the old lady's condition at the time when the wills propounded were executed. One of those documents was dated March 17, 1896; another, July 24, 1896; a third, August 3, 1896. These were brought to the attention of the plaintiffs, at any rate

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before the period of this litigation. There was also evidence that the testatrix was in the habit of writing out, not only those three documents, but a number of others in the nature of wills, some of which were destroyed by the instructions of Mr. Bellamy as being worthless; but of course these particular facts were relied upon by counsel for the defendant as shewing that the old lady was in such a state of mind as to have indulged in will-making of an incoherent and unreasonable nature.

Those are the short facts which were not substantially in dispute, and which were before the trustees and executors at the time when they had to make up their minds with regard to this litigation.

It is not suggested against these three gentlemen that they were guilty of any impropriety of conduct in what they did, or in the action which they took in regard to the matter; but, as I understand the contention put forward against them as to costs, it is that they really were in a position to know, or practically ought to have known, the true position of affairs as disclosed in the course of this inquiry; and that, having that knowledge, they propounded the will with the great risk of being defeated in view of all the circumstances of the case, and especially the great age at which she entered into the transaction—in other words, that they practically backed their own opinion about her, and were found, upon a full investigation of the matter, to be mistaken, because the jury gave their verdict, after a very few minutes' deliberation, that the two documents of March and April, 1896, could not stand. Certain authorities have been furnished to me by counsel on both sides. I do not think they have very much bearing upon the question, because the rules I have indicated are perfectly familiar to this Court, and one must guide oneself by the general application of the principles laid down.

The principal case furnished to me in support of the application of the plaintiffs is *Boughton* v. *Knight* (1), in which the Court, in the circumstances of the case, ordered that the costs of both sides should come out of the estate. That case was

(1) L. R. 3 P. & M. 64.

one of a very peculiar character, and I think that the summary of the reasons which led the Court to make the order it did may be found in the concluding sentence of Sir James Hannen's judgment: (1) "Thinking that Sir Charles" (Boughton) "was honestly led into this litigation by the fact that the testator seemed to all outward appearance to be capable of managing his affairs; and, in the absence of evidence to the contrary, was justified in bringing the case before the Court, I order costs on both sides out of the estate."

A perusal of that case, and especially the reason summarized at the close of the judgment, shews how remarkably that is to be differentiated from the present case. It is obvious, from the short recital of the facts which I have given here, that the three plaintiffs cannot be said, in the words I have just read, to have been "honestly led into this litigation by the fact that the (testatrix) seemed to all outward appearance to be capable of managing (her) affairs," the facts here being, indeed, quite the contrary: she was a very old woman; she was not managing her own affairs; they were being managed for her, and being managed for her by these three gentlemen.

The general circumstances seem to me to shew that this is not a case in which it can truly be said that the testatrix herself was the cause of the litigation, because these three gentlemen were as much parties or privy to the making of the documents as she was herself. In saying this, I am speaking of the act of one as the act of all the three. They were there, and were thoroughly able to judge of the state of things; and, so far as regards their conduct, they were as much concerned in the making of the wills they set up as she herself was. I am not saying in the least that they acted improperly: they took a view about the old lady—a view which was mistaken, and which the jury have now found to be mistaken. Under these circumstances, the costs ought not to be paid out of the estate.

The point which remains for consideration is whether the costs ought not to follow the event. When all the facts are considered and what was in the cognizance of these parties, it

(1) L. R. 3 P. & M. at p. 79.

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cannot be contended that they were *led* into the belief that this old lady was capable of managing her own affairs and of making these wills. The truth is, as I said before, they took a view and acted upon it; and when it came to a fight between themselves, on the one side, and the persons interested under an intestacy, on the other side, they stood to win one way and to lose the other. I see, therefore, nothing to warrant a departure from the ordinary rule. Costs must follow the event. Some of the parties, other than the defendant, have applied to me for a separate order for their costs. I am of opinion that I could not reasonably accede to those applications. The reason given for the decision in *Rayson* v. *Parton* (1), cited here on behalf of the heir-at-law, is not applicable to the present case. A considerable change was effected in the position of the heir-at-law by the Land Transfer Act, 1897. His position is practically that of the next of kin; and practically the heir-at-law and all the other persons who benefit by an intestacy were fighting in the same interest as, and, so far as they took any steps at all, in support of the defendant. I see no reason why they should not have joined in supporting the defendant, and so fought the case as a whole.

It would be unreasonable, in my view, to saddle the plaintiffs with any but the defendant's costs. I therefore refuse these applications.

Solicitors for plaintiffs: *Kennedy, Hughes & Ponsonby, for Colmore & Monckton, Birmingham.*

Solicitors for defendant: *Tippetts, for E. Eaden, Birmingham.*

Solicitors for heir-at-law: *Nicholson & Crouch, for Cresswell & Russon, Bromsgrove.*

Solicitors for parties cited: *Tippetts; Timbrell & Deighton, for C. U. Jagger, Birmingham.*

(1) L. R. 2 P. & M. 38.

H. D. G.

Applied. *Re* WINGHAM (*decd.*).
[1948] 2 All E.R. 908.

GATTWARD *v.* KNEE.

1901
Dec. 10.

Probate—Soldier's Will—Wills Act (1 *Vict. c.* 26), *s.* 11.

Mobilization may be fairly taken as a commencement of that which, in Roman law, was understood by the words "in expeditione." If the order to mobilize has been received, although any particular member of the force may himself have taken no step under it, yet the order itself so affects his position, as a unit of the whole force, as to place him "in expeditione."

On September 7, 1899, a battalion stationed in India was "warned" for service, and two days later was "ordered to mobilize" for active service in South Africa, and embarked on September 19, 1899. The deceased, a private soldier in that battalion, wrote, between September 8 and September 19, an undated letter, which was received by the plaintiff in England on October 2, 1899. The writer died of fever during the siege of Ladysmith on February 9, 1900.

The letter contained (inter alia) the expressions: "If you have a letter to say that I am killed, then the lot is for you." . . . . "You will receive the lot if I am killed in action, for I shall make out my will in your favour."

No other document in the nature of a will was ever received or discovered, and the father of the deceased, the latter being unmarried, took out letters of administration.

The plaintiff having propounded the letter as the will of the deceased soldier, claimed revocation of the grant of administration:—

Held, that the document was testamentary, and that it was a soldier's will within the meaning of s. 11 of the Wills Act.

THIS was a probate suit in the estate of William Knee, a private in the 2nd battalion of the King's Royal Rifles, who died of enteric fever on February 9, 1900, during the siege of Ladysmith, in Natal, South Africa.

In September, 1899, while stationed at Fort William, Calcutta, he wrote the following letter, which was received by the plaintiff, William Gattward, on October 2, 1899:—

"1479 Pte. W. Knee, D Company, 2nd K.R.R.,
"Natal, South Africa.
"(For Transvaal Campane.)

"Dear Bill,—Just a few lines to you hoping that you are not dead yet, as I have received no answer to the last letter I sent you. I do not know whether you are waiting for me to

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come home or not, but there is no knowing when I will arrive, as we are just off to South Africa again for the Boer war—if war is declared at all. It is hard lines, seven years and four months' service and got to go there; but it cannot be helped. I am sending a box of things to you, which I want you to look after for me till I come home, for there are some things that I got out here; I think a lot of them. I will shew them to you when I come; they are a lot of curios and there is some things for you there; but if you have a letter to say that I am killed, then the lot is for you; and, also, I have about 13*l.* in the bank and 18*l.* deferred pay, which will come to 31*l.* You will receive the lot if I am killed in action, for I shall make out my will in your favour; so you can keep this letter in case you want it for anything, but let us hope that I arrive home safe again. I am looking forward to a grand time with you and the missus—yes, for we will have one when I come home. Please excuse blacklead, as I want to catch the mail and every one is using or waiting for the ink. Hoping you are enjoying good health, as I am at present. Please write my address as in this letter.

"I remain, from your old chum, hoping to see you at the end of the war, "W. Knee."

"Take the note off the top of the box."

On hearing of the death, the plaintiff told the War Office authorities of this letter, and inquired whether any will had been found among the deceased's effects. A lengthy correspondence ensued, and in or about July, 1901, the plaintiff gave instructions to his solicitors to apply for administration with the above letter annexed; but before he proceeded to take administration, he communicated with the defendant, who was the father of the deceased, and inquired whether he would take the grant or renounce in his (the plaintiff's) favour.

On July 31, 1901, the defendant took out letters of administration to the deceased's estate, swearing that he died intestate.

On August 14, 1901, the writ in the present suit was issued by the plaintiff, who claimed revocation of the grant obtained

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by the deceased's father, propounded the letter in question as containing the last will of the deceased, and claimed that a grant, with the said will annexed, should be made to himself.

Information recently obtained through the War Office shewed that on September 7, 1899, the deceased's battalion was warned for service, and two days later was ordered to mobilize for active service in South Africa, and that they sailed from India in the Steamship *Purnea* on September 18, 1899, bound for South Africa.

H. C. Richards, K.C. (*Soper* with him), for the plaintiff. The letter was written and posted after the battalion had mobilized, and, on mobilization, the deceased was in expeditione: *In the Goods of Hiscock*. (1)

Barnard, for the defendant. In the case cited the Court based its decision on the evidence that Hiscock had performed some physical act under the order for mobilization, and had thereby put himself in expeditione. No such evidence is before the Court in the present instance; and the onus of giving that evidence lies upon the plaintiff. Moreover, it is incumbent upon the plaintiff to shew that the document he is propounding was written with the intention that it should be the will of the writer; but the words "I *shall* make out my will in your favour" shew that the writer did not intend this document to be his will.

JEUNE P. I am clearly of opinion that this paper is a testamentary disposition. Cases are sometimes met with that run rather close on the point as to whether certain words of contingency limit the operation of a particular document, and are intended to make it conditional under certain circumstances. In the present instance, the phrase "if I am killed in action" appears to me to be only the general expression which a man may use if he is going into danger. All this man meant was This shall take effect if I die. I am satisfied that he did not mean to draw any distinction between being killed in action and dying from fever in South Africa. The whole document

(1) [1901] P. 78.

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The President.

seems to me to shew that it was intended as a testamentary disposition. No doubt he had it in his mind to draw up a more formal will, but that, in my view, does not in the least prevent this document taking effect if he had not an opportunity, which I suppose he had not, to execute a less informal document. I hold, therefore, that this is a testamentary document. Then comes the question, Is it a soldier's will within the meaning of the Wills Act? Upon the whole, I am of opinion that it is. In so holding I am perhaps going a step further than in my recent decision—*In the Goods of Hiscock* (1)—but I have no doubt myself that mobilization, giving to that word the effect which I understand it to carry, may be fairly taken as a commencement of that which in Roman law was expressed by the words *in expeditione*. These words meant something more than the English words "on an expedition," because it is quite clear that when a force begins in a sense to engage in or to enter upon active service, it would be said to be *in expeditione*. I thought, when deciding the case cited, and I still think, that it is a fair test to ask whether or not the person whose testamentary dispositions are in question has done anything; but I am of opinion that if the order for mobilization has been received, although the man himself may have done nothing under it, yet that order so alters his position as practically to place him *in expeditione*. Such an order goes beyond a mere warning. I do not think a mere warning for active service would be sufficient; but when a force is mobilized I understand this to be that it is placed under military orders with a view to some step being taken forthwith for active service. That is what happened in the present instance: within nine days after the order to mobilize was given the force embarked for South Africa.

Upon the evidence before me, I have no doubt that this letter must be taken to have been written at some time between the 8th and 19th September, 1899: it was clearly written from Calcutta, before the vessel left; and, taking the course of events, and assuming there to have been a mail which he says he was going to catch, I find that the letter was written

(1) [1901] P. 78.

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between those dates, and that it was written after the formal order to mobilize had been received and in view of the embarcation which did almost immediately afterwards take place.

In my view, the evidence before me has brought the deceased within the rule of law which enables this document to be received as a will, and I hold this to be a soldier's will under the Wills Act. I therefore revoke the letters of administration taken out by the defendant, and I admit this document to probate as the will of the deceased.

The grant of letters of administration, with the will annexed, can be taken out in the registry in the ordinary course. I make no order as to the costs. (1)

Solicitor for plaintiff: *E. H. Goddard.*
Solicitor for defendant: *R. H. Bentley.*

(1) On December 16, 1901, in a probate suit of *May* v. *May*, where the deceased, who was a man of education and had risen from the ranks to the position of quarter-master and hon. lieutenant in the Grenadier Guards, had sailed with his wife to Gibraltar, and was afterwards seen off by her from that place under orders for South Africa, the wife, it appeared, wrote to him afterwards, telling him about the will of a brother officer, whose affairs, she said, had been left in disorder. He answered that letter under date March 22, 1900, saying, "As regards my will, I am sorry I have not made one .... I leave everything to you, as, should the boy require anything, you will provide for him." The wife received this letter on April 16, 1900; and she subsequently received other letters of later dates. The widow, who was now in receipt of a pension from the War Office, propounded the letter of March 22, 1900, as the will of the deceased. The defendant, who was their son, aged twelve, appeared by his guardian ad litem and opposed.

GORELL BARNES J., having been informed of the President's decision in *Gattward* v. *Knee*, followed it and pronounced for the document in question. Costs as between solicitor and client out of the estate.

Counsel: *R. H. Pritchard; Rayden.*

Solicitors: *T. P. McKie Sharp; J. R. Fox.*

H. D. G.

1902
Jan. 13, 16.

In the Matter of JENNY MORRIS.

Practice—Married Woman—Protection Order—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 21—*Matrimonial Causes Act*, 1858 (21 & 22 *Vict. c.* 108), *s.* 7—*Husband's Address unknown—Citation dispensed with.*

Upon an application by a wife who had been deserted by her husband, and whose only information as to his whereabouts consisted of a statement by his brother that he was believed to be somewhere in Melbourne, the judge (Jeune P.), in chambers, granted a protection order without notice being given to the husband.

This was a summons by Jenny Morris, a married woman, by reason of the desertion of her by her husband, Neil Morris, on October 6, 1897, to protect any money or property in England which she might have acquired by her own lawful industry, and any property which she might have become possessed of, or which she might at any time become possessed of, after such desertion, against her husband, Neil Morris, and his creditors, and any person claiming under him.

It appeared, from the affidavit of the applicant, that under the will of her brother, John Macgregor, formerly of Rangoon, who died in August, 1900, in Scotland, she was left a legacy of 2000*l.* The will, which was made in Rangoon, was proved in the chief Court of law in Burmah on February 6, 1901; and it was also proved in Scotland.

On September 17, 1901, the will was also proved and registered in the Principal Probate Registry of this Division at Somerset House.

Considerable correspondence ensued between the applicant's solicitors and Messrs. Walker & Orr, of Glasgow, the solicitors for the executors of the will, in regard to the domicil of the parties concerned and as to the payment of the legacy, the contention on behalf of the executors being that the husband of the applicant would have power to administer her property according to the law of Scotland, that the payment of the legacy in question was governed by that law, and that it was essential for the husband to consent to or concur in the payment

of the legacy being made to the wife. They further contended that the Married Women's Property Act, 1882, did not apply to this legacy, notwithstanding that the wife was domiciled in England, and that the husband was also domiciled in England until 1897, the date of the desertion. Finally, they stated that they would be willing to hand over the legacy to the applicant on production of a protection order.

Inquiries had been made of the brother of Neil Morris down to within the last few months, and he was said to have stated that he did not know the address of Neil Morris, but believed he was somewhere in Melbourne, Australia.

Upon the summons coming on before the President, in chambers, his Lordship raised the question whether a citation or notice of some sort must not be served, either personally or otherwise, upon the husband, and the matter was adjourned for authorities on the point to be adduced.

Barnard, for the applicant, relied upon *Ex parte Hall* (1) and *Ex parte Mullineux*. (2) He contended that *Matthew* v. *Matthew* (3) was not really an authority against the application, as it only decided that, if the whereabouts of the husband were known, notice must be given of such an application as this.

JEUNE P. (in chambers). I will follow the decision in *Ex parte Hall*. (1) I make the order accordingly.

Solicitors: *Carr, Tyler & Overy.*

(1) (1858) 27 L. J. (P. & M.) 19. (2) (1858) 27 L. J. (P. & M.) 19.
(3) (1869) 19 L. T. 662.

H. D. G.

1901
Dec. 9.

In the Goods of BRAMLEY.

Will—Construction—"The rest of my Money"—Other Property.

The meaning to be attached to the word "money" in construing a testamentary document is not absolute and technical, but must depend upon the context and surrounding circumstances.

Where a testator, by his will, left a specific legacy to his brother, and gave "the rest of my money" among six other persons, whom he named:—

Held, that the latter bequest covered all the residue of his estate.

This was a question of construction arising on the will of Thomas Bramley, deceased.

The estate, which was of the total gross value of 1152*l.*, consisted almost entirely of money, the other items being a policy of insurance for 141*l.* and clothing and personal effects of the estimated value of 10*l.* The debts owing by the deceased amounted to about 114*l.*

The present application was on behalf of all the residuary legatees, who had agreed that one of their number should take a grant of administration with the will annexed.

The testator died on October 1, 1900. By the will, which was dated September 29, 1900, he appointed no executor, but, after revoking all former wills and codicils, he bequeathed 100*l.* to his brother, and left "the rest of my money" to be equally divided amongst six persons, whom he named.

Alfred Bramley, the brother, was the testator's sole next of kin, but there were several nephews and nieces who would be entitled in distribution in case of intestacy.

Barnard, for the applicant. The words "the rest of my money" should be construed in the most general sense and as intended to mean "the rest of my property." If the document had contained a direction to pay debts and legacies, the words "the rest of my money" would certainly be held to mean "the rest of my property." The omission of any specific direction to pay debts and legacies really makes no difference; the bequest of 100*l.* legacy to the brother is tantamount to a

direction to pay 100*l.* out of the estate, the estate generally being liable to the payment of specific legacies. The authorities most nearly in point are *In re Smith, Henderson-Roe* v. *Hitchins* (1), and *In re Cadogan, Cadogan* v. *Palagi.* (2) A somewhat similar point of construction was also before this Division: *In the Goods of White.* (3)

Willock, for the brother, and also for other persons interested in an intestacy.

JEUNE P. The authority of *In re Cadogan* (2) enables me to decide this case without taking further time for consideration. In giving judgment in that case Kay J. said (4): "I feel compelled to hold that the lady used the word 'money' in this will in the popular sense as a description of all her personal estate, and I do not think that any of the cases have laid down a rule which prevents that construction." And, later on, referring to a case of *Prichard* v. *Prichard* (5), he says: "That case is at least an expression of opinion, in which I respectfully concur, that there should be no absolute technical meaning given to such a word as 'money' in a will, but that its meaning in every case must depend upon the context, if there is any, which can explain it, and upon those surrounding circumstances which the Court is bound to take into consideration in determining the construction."

On the authority of those cases I am of opinion that the use of the term "money" in the will before me was intended by the testator to cover all his personal estate. That being so, I think the applicant is entitled to take a grant of letters of administration with the will annexed, subject to proof of due execution.

Solicitors for applicant: *Collyer-Bristow, Hill, Curtis & Dods, for Stone, Simpson & Mason, Tunbridge Wells.*

Solicitors for next of kin and other persons interested: *Jennings, Son & Allen.*

(1) (1889) 42 Ch. D. 302.
(2) (1883) 25 Ch. D. 154.
(3) (1882) 7 P. D. 65.
(4) 25 Ch. D. at p. 157.
(5) (1870) L. R. 11 Eq. 232.

H. D. G.

1902
Jan. 29.

KENT *v.* KENT and Others.

Wills—Power of Appointment—Exercise by Will—Subsequent Will—No Clause of Revocation—No Reference to Power—"Give, Devise, Bequeath, and Appoint"—Power held to be exercised—First Will excluded from Probate.

Where a testator, having made a will reciting a power of appointment and exercising or purporting to exercise that power, made a subsequent will, which contained no clause of revocation and no reference to the power, but by which he purported to "give, devise, bequeath, and appoint" all his real and personal estate:—

Held, that the word "appoint" was, under the circumstances, a sufficient exercise of the power, and that the second will, by implication, revoked the first.

The principle of the decision in *In re Mayhew, Spencer* v. *Cutbush*, [1901] 1 Ch. 677, followed.

The plaintiff, as one of the executors of Edmund Jackson Kent, deceased, propounded two testamentary papers dated respectively October 16, 1894, and December 4, 1896, as together constituting the last will of the testator.

The defendants, Louisa S. Kent, Robert Jackson Kent, and Ernest Charles Thurgood, after a formal plea that the earlier document was not duly executed, alleged that it was revoked by the later document, which they propounded as alone constituting the true last will of the testator. The plaintiff and the defendant Ernest Charles Thurgood were named as executors in the later document.

The material words in the earlier document were as follows: "I hereby devise, bequeath, and appoint all my real and personal estate whatsoever belonging to me or over which I have a power of appointment under the will of my late father . . . . unto my trustees upon trust . . . ."

The later document, which, like the earlier one, commenced with the words, "This is my last will and testament," contained no clause of revocation, but named the same two persons as executors and trustees of "this my will." It then continued in these words: "I give, devise, bequeath, and appoint all my real and personal estate whatsoever unto my trustees upon trust . . . ."

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There was, in the later document, no recital of the power of appointment conferred upon the testator by his father's will.

Under the will of the testator's father creating the power, the trustees of that will were to stand possessed of certain funds and the income thereof, and also of a share in his residuary estate upon trusts in the said will declared for the benefit of Edmund Jackson Kent (the present testator), his wife, children, appointee, and appointees; with an ultimate trust in favour of "all or such one or more exclusively of the other or others of the children or remoter issue of Edmund Jackson Kent (such issue being born in his lifetime) at such ages or times or age or time, in such share if more than one, and in such manner as" the said Edmund Jackson Kent should "by any deed or deeds with or without power of revocation and new appointment or by his will or any codicil thereto appoint"; and, in default of such appointment and so far as any such appointment, if incomplete, should not extend, in trust for all his children equally.

Alan Stewart, for the plaintiff, asked for probate of both documents.

R. H. Pritchard, for Mrs. Helena Louise Henton, a daughter of the deceased and one of his next of kin, supported the plaintiff's claim.

Inderwick, K.C., and *Beddall*, for the three defendants who had pleaded against the earlier document. The testator uses the word "appoint" in the later document, and under a recent decision in the Chancery Division, which this Court should adopt, that amounts to an exercise of the power: *In re Mayhew*, *Spencer* v. *Cutbush*. (1) The later will revoked the earlier one, including the appointment.

Alan Stewart, in reply. *Spencer* v. *Cutbush* (1) was said by Farwell J. to be very near the line; and, moreover, in that case, there was no other appointment possible. If the Court accedes to the contention on the other side, it will be overruling the principle of its own decision in *Cadell* v. *Wilcocks*. (2)

(1) [1901] 1 Ch. 677. (2) [1898] P. 21.

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KENT v. KENT.

JEUNE P. In this case I have to consider whether one or both of these two wills should be admitted to probate.

The question of principle which has to be decided appears to me to have been settled by the case of *Cadell* v. *Wilcocks* (1), from which I see no reason to depart. The principle, as I said then, was this: "I think that this case is governed by the familiar principle of law stated in Williams on Executors, 9th ed. p. 138, and approved by Lord Penzance in *Lemage* v. *Goodban* (2), that the mere fact of making a subsequent testamentary paper does not work a total revocation of the prior one, unless the latter expressly or in effect revoke the former, or the two be incapable of standing together, and if a subsequent testamentary paper, whether will or codicil, be partially inconsistent with one of earlier date, then such later instrument will revoke the former as to those parts only where they are inconsistent."

In this case, what one has to consider is whether the second will does or does not revoke the first. That it does not do so in terms is clear, because there are no distinct words of revocation, though such words are very often inserted; but the question is whether it does not do so in effect.

Now, as regards the property of the testator other than that subject to the exercise of the power of appointment, there is no question; the second will does do that, and there is no doubt does effect the revocation of the earlier will in respect of that. But that is a comparatively small matter, not only because no question can arise about it, but because it was only a very small part of the testator's property which was not affected by the power of appointment. Therefore, the important question really is whether or no, as regards the power of appointment, the second will so executed that power as to constitute it, in effect, a revocation of the first. I think that turns to a very great extent upon the effect of the word "appoint" which is in the second will. In the first will there is a distinct reference to the power. Whether it was properly exercised or not, there can be no question that by the first will the testator did intend to execute that power. In fact he says so. But when you

(1) [1898] P. 21. (2) (1865) L. R. 1 P. & D. 57.

come to the second will, he uses only the word "appoint": "I give, demise, bequeath, *and appoint.*"

At the first blush I confess I was rather inclined to think that that mere use of the word "appoint" would not be sufficient to execute the power of appointment; and if so, the appointment by the first will would be left, and would not be affected by the language of the second. The case of *Spencer* v. *Cutbush* (1) turned upon the question whether the word "appoint" was sufficient to execute a limited testamentary power of appointment. In that case the testatrix had a testamentary power of appointing a share of personal estate amongst her nephews and nieces, and it was shewn she had no other power of appointment.

The language used by the will was this: "I appoint, devise, and bequeath my real estate and the residue of my personal estate to my trustees"; so that the real question turned upon the effect and use of the word "appoint," there being no specific power of appointment which in that case the testatrix possessed.

The way in which Farwell J. appears to have looked at it was to consider whether or no, having the word "appoint," that was sufficient to shew there was an execution of the power of appointment. He came to the conclusion it was. He had before him several points, some of which are repeated in this case. One of the main ones undoubtedly was that there was in that case, as there is in this, no other power to which the testator can be supposed to refer. It was shewn in that case, and I think it is to be inferred in this case, that there was no other power of appointment—general or special—which could have been intended to be exercised under the particular power given to the testator by his father's will.

Then Farwell J. appears to have been greatly influenced by this consideration: that the gifts in the will which he had to consider were to persons who were within the special terms of the power of appointment.

In this case the argument is not very strong in this respect, because when one looks at the exercise of the power (and the

(1) [1901] 1 Ch. 677.

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KENT v. KENT.

The President.

first will is a clear exercise of the power) there is undoubtedly some execution which would not be strictly within the terms of the power of appointment: to cite one instance, the giving the 600*l.* in favour of the widow of the son was not an object contemplated by the grandfather, the original donor of the power. But the force of that observation is very much cut down when one comes to see that even the admitted execution of the power by the first will is by no means perfect. It is extremely imperfect. There are several respects in which it may be very well said that even that is an inaccurate or imperfect execution of the power.

Looking at the matter a little more generally, I feel it impossible not to suppose that the testator, in dealing with the second will, had in his mind the execution of that power. The general scope of the case, the general scope of the persons who are mentioned, and the way of dealing with it, appears to me to shew that he did intend to deal with the exercise of the power and to benefit to a great extent substantially the same persons whom he had intended to benefit by the first execution of the power—that is to say, the proper objects of the execution of the power according to the grandfather's donation of that power.

I think it is impossible to read the second will and not think that some execution of the power was intended, especially when one considers how very small was the amount of the testator's property apart from that as to which he held this power of appointment.

It appears to me almost impossible to read that second will and not to think that the testator was intending to deal with substantially the same subject-matter as he had intended to deal with by his earlier will. I do not know that there is any specific phrase that one can point to in the second will which is conclusive on the point; but it does appear to me that the general scope of the second will is a substantial dealing with the same matter as he had intended to deal with by his earlier will. Therefore, having regard to the fact that Farwell J. held that the word "appoint," if taken in a proper context and if taken in proper surrounding circumstances, is sufficient to

execute a limited power of appointment, it appears to me that there is no legal difficulty in holding that in the second will the testator, by the word "appoint," did not intend merely to use a conventional term, but did intend to execute a power of appointment.

If I once see that the law enables me to say that, certainly, looking at the tenor of the second will, I can feel no difficulty in holding that the testator did intend by that second will to execute the power of appointment. If that be so, he has certainly by his second will executed the power of appointment in a way which appears to me to be clearly intended to supersede the exercise of his power by the first will. Under those circumstances, it appears to me that the second will, although there are no words of revocation, does constitute, not only the expression, but the whole expression, of the testator's intentions. Therefore, it is the second will alone that ought to be admitted to probate.

Solicitors for plaintiff: *Kent & Son.*

Solicitor for Helena L. Henton, one of the next of kin: *J. E. Churchill.*

Solicitors for Louisa S. Kent, Robert J. Kent, and Ernest C. Thurgood: *Booth & Smee.*

H. D. G.

1902
Feb. 3.

In the Goods of PAMELA COOK.

Will—Simple Direction to pay Debts—Executor according to the Tenor.

A simple direction to a certain person to pay debts of the testatrix, without any bequest to him and without specifically appointing him as trustee, may be enough to constitute him executor according to the tenor.

A testatrix, after bequeathing certain pecuniary legacies, desired J. G. to pay all her just debts, and then bequeathed to her niece, P. M., all her furniture and effects and all money she possessed:—

Held, that J. G. was thereby constituted executor according to the tenor.

This was a motion for a grant of probate to John Goodrick as an executor according to the tenor.

The testatrix, Pamela Cook, late of Shelley Cottage, Maresfield, in the county of Sussex, widow, died on November 24, 1901. By her will dated March 19, 1897, after bequeathing certain pecuniary legacies, she desired John Goodrick to pay all her just debts, and then bequeathed to her niece Pamela Martin all her furniture and effects and all money she possessed.

The registrar refused to grant probate to Mr. Goodrick on the ground that to constitute a person executor according to the tenor he must not only have some duty to perform, but there must also be a gift to him.

Hence the present application, to which Pamela Martin, the residuary legatee, consented.

The gross estate was valued at about 220*l.*

Barnard, for the applicant. The direction to pay debts must mean to pay debts out of the estate.

[The President. He might be an agent for the legatees.]

There is nothing to point to that construction. The Court should hold him to be an executor according to the tenor. [He referred to *In the Goods of Oliphant.* (1)]

Jeune P. This case does not appear to be covered by authority. When a trustee is directed to pay debts as executor,

(1) (1860) 1 Sw. & Tr. 525.

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COOK, IN THE GOODS OF.

The President.

he is to be treated as executor; and where there is a legatee of the whole estate, and the trustee is directed to pay debts and legacies, he is to be treated as executor. But where you have a legatee for a certain sum, part only of the estate, the same rule does not apply, because the direction to pay debts is treated as a charge on the specific legacy. This view would, I think, be possible in the present case; and it might be said that, inasmuch as the whole property was given to somebody else, the testator might have intended the trustee to act as that person's agent to pay the debts. But I think that the more reasonable construction is that, inasmuch as under this will the debts which the trustee is directed to pay must of necessity be paid out of the estate, the effect of the will is to appoint the trustee executor according to the tenor. I therefore grant probate to him.

Solicitors: *Burchell, Wilde & Co.*

H. D. G.

[DIVISIONAL COURT.]

1902

March 4.

THE MYSTERY.

Admiralty — Collision — Damage—Control by Dock-master, his Deputies or Assistants—Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 *Vict. c.* 27), *s.* 53—*Co-defendants—Costs.*

Under No. 2 of the by-laws, and Nos. 10 and 17 of the regulations of the London and India Docks Company, issued under the London and India Docks Amalgamation Act, 1900, which incorporates the Harbours, Docks, and Piers Clauses Act, 1847, the expression "dock-master" includes his duly authorized deputies and assistants, and vessels are to be moved by the persons in charge under the direction of the dock-master, who may also give any other directions.

The plaintiffs' steam vessel was entering the defendants' dock under the direction of the dock-master, who was standing on one of the pier-heads. At the same time an official of the dock company (a lock foreman in uniform) standing on the other pier ordered a ketch, belonging to the other defendants, and lying within the prescribed limits of the authority of the dock company, to swing round for the purpose of entering the dock. By a second (and as it was found improper) order, the lock foreman directed some barges, to which the ketch was fast, also to swing,

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with the result that the ketch, being unable to check herself by the rope which was fast to the barges, without any negligence in those in charge of her, came into collision with the plaintiffs' steam vessel. The judge of the City of London Court pronounced in favour of the plaintiffs against both defendants, on the ground of the improper order of the official of the dock company, and the absence of any statutory exemption relieving the owners of the ketch from liability for the tort committed:—

Held, by the Divisional Court (Sir F. H. Jeune P. and Gorell Barnes J.), that the defendant dock company was alone liable for the damage sustained by the plaintiffs' vessel, as the lock foreman was a deputy or assistant of the dock-master within the meaning of rule 2 of the by-laws, whose orders those in charge of the ketch were bound, under the provisions of the Harbours, Docks, and Piers Clauses Act, to obey, and as the relationship of master and servant did not exist between the dock official and the owners of the ketch, they were not responsible for his negligent order.

Held, also—following *The River Lagan*, (1888) 6 Asp. M. L. C. 281—that the plaintiffs acted reasonably in joining both parties as defendants, and that, as the defendant dock company threw the blame on the other defendants, but were themselves alone to blame, the plaintiffs' costs against both defendants, and the costs of the owners of the ketch, both in the Court below and on appeal, must fall on the dock company.

APPEAL, in an action of damage by collision, by the defendants, owners of the *Mystery*, and by the defendants, the London and India Docks Company, proprietors of the Victoria Dock, London, against a decision of the judge of the City of London Court in favour of the plaintiffs, the owners of the *William Adamson*.

The case raised the question of the liability of a dock company for the wrongful order of a sub-official, and the question of the costs for which co-defendants are liable.

The facts were shortly as follows:—

On October 28, 1901, about 2 P.M.—the weather being fine and clear, with a fresh breeze from the S.W., and the tide the last of the flood—the plaintiffs' screw steamship *William Adamson*, of 1986 tons gross register, arrived off the Victoria Dock entrance, and was proceeding, with her helm hard-a-starboard, and a port check rope ashore, to enter between the piers, under the direction of the dock-master who was on the upper pier-head. At the same time the defendants' ketch, *Mystery*, of eighty-three tons and four hands, bound from Grays into the Victoria Dock—which had been lying, head down

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river, just below the lower pier-head, and with a rope forward and aft fast to the outermost of four barges, also heading down river and fast head and stern to each other against the dock wall—received an order from a dock official in uniform on the lower pier-head, called the lock foreman, to cast off her stern rope and pass it ashore, so that it might be made fast to the lower pier-head, and with that rope over her port quarter haul on it so as to swing round with the tide and be in a position to enter the dock.

Whilst the *Mystery* was checking herself with the forward rope which was still fast to the outer barge, the four barges were ordered by the lock foreman to pass their stern ropes ashore and swing in the same way, the result being that the bow rope of the *Mystery* failed to check her, and, in the process of swinging, the wind caught her on the port bow and brought her in contact with the stern of the *William Adamson*, the bowsprit of the ketch damaging the wheel of that steamship.

The plaintiffs, James Westoll and others, the owners of the *William Adamson*, commenced an action in the City of London Court against the owners of the *Mystery* to recover the damage sustained, and, in consequence of the answers of the owners of the *Mystery* to interrogatories administered to them by the plaintiffs, the plaintiffs took out a summons for directions, and obtained an order adding the London and India Docks Company as second defendants in the action.

In giving judgment the learned judge, who was assisted by nautical assessors, said with reference to the second order given by the lock foreman: "I think the order given was, under the circumstances, improper and negligent, and I think it was an order that was fraught with danger to the *William Adamson* unless certain precautions were taken. The whole manœuvre was executed under the direction of an officer of the dock company, and sufficient precautions were not taken . . . . I think the dock company are liable . . . . I am prepared to find for the purposes of this case that the *Mystery* carried out the orders of the dock company without any negligence of execution; that they did what they were told to do . . . . Nevertheless I am not prepared to find that that absolves the

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Mystery from being liable for the tort which has been committed. With regard to the analogy of compulsory pilotage, there is a special section which says on the employment of a compulsory pilot his orders shall be expressly followed and the ship not be liable. There is nothing of that sort here. I know nothing in the ordinary law which absolves them . . . . I give judgment against both defendants with costs."

On appeal:—

Scrutton, K.C., and *Dawson Miller*, for the appellants (defendants), the owners of the ketch *Mystery*. By the decree in the Court below both defendants were made liable for the damage to the plaintiffs' vessel on the ground that it was caused "through the negligent and improper management of the ketch *Mystery* by the persons in charge thereof, and by the servants of the defendants, the London and India Docks Company"; but, so far as the *Mystery* is concerned, the findings of fact of the learned judge are that those in charge of the ketch carried out without negligence the orders they received from a responsible dock official.

It is submitted that, in these circumstances, those in charge of the ketch were bound, under the Harbours, Docks, and Piers Clauses Act, 1847 (1) (which is incorporated in the London and India Docks Company's Act), to obey the orders given to them, and, therefore, that the case is brought within *The Bilbao*. (2)

[They were stopped by the Court.]

Pickford, K.C., and *Bucknill*, for the appellants (defendants), the London and India Docks Company. Admitting that, though the collision occurred outside the dock, it was within

(1) 10 & 11 Vict. c. 27, s. 53: "The master of every vessel within the harbour or dock, or at or near the pier, or within the prescribed limits, if any, shall regulate such vessel according to the directions of the harbour-master, made in conformity with this and the special Act; and any master of a vessel, who, after notice of any such direction by the harbour-master served upon him, shall not forthwith regulate such vessel according to such direction, shall be liable to a penalty not exceeding twenty pounds."

(2) (1860) Lush. 149.

the prescribed limits of the dock company's authority, it is submitted, first, that the lock foreman had no authority to give any orders. His duty was to carry out the orders of the dock-master, who was present on the pier-head giving the necessary directions for the *William Adamson* to enter the dock. It is admitted on behalf of the *Mystery* that the dock-master did not give the alleged wrong order, and whilst he was there all orders would have to come from him, as the words "deputies and assistants" used in the company's by-laws (1) in the definition of "dock-master," are derived from the Harbours, Docks, and Piers Clauses Act, 1847, and only refer to officials duly authorized to act as his delegates, or, in his absence, as his representatives.

Secondly, it is admitted on behalf of the *Mystery* that the order to those in charge of that ketch was proper; but assuming that the second order was given to the four barges to swing, and that that order was wrong, those in charge of the *Mystery* were negligent in not dropping her anchor or using other precautions to check her, and so avoid the collision. This would render the owners of the *Mystery* responsible: *The Cynthia.* (2)

Thirdly, the lock foreman had no control over the ketch or the barges; they are not the property of the dock company, there was no compulsion on them to obey the order, and if the order was given, it was carelessly obeyed; for all that was intended was that the barges should get ready to follow the ketch when the *William Adamson* had passed safely into the dock; in other words, the case would be that of the negligent carrying out of a proper order.

(1) By-laws made by the London and India Docks Joint Committee, allowed by a judge of the High Court, May 3, 1893, and, by the operation of clause 39 of the London and India Docks Amalgamation Act, 1900, now applicable to the undertaking of the London and India Docks Company:—

"2. In these by-laws the expression . . . . 'the dock-master' shall, with reference to any act or thing to be done in or about any dock, mean the dock-master of such dock, and shall include his duly authorized deputies and assistants . . . ."

See also the interpretation clause (s. 2) of the Harbours, Docks, and Piers Clauses Act, 1847.

(2) (1876) 2 P. D. 52.

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Aspinall, K.C., and *Balloch*, for the respondents (plaintiffs), the owners of the *William Adamson*.

[Rules 10 and 17 (1) of the dock company's regulations and the case of *Taylor* v. *Burger* (2) were referred to.]

THE PRESIDENT (SIR F. H. JEUNE). I am inclined to give great weight to the findings of the learned judge who heard the evidence and saw the witnesses; but, accepting the findings of fact, I am at a loss to see how the *Mystery* can be held to blame. If those in charge of that ketch only obeyed the orders of the dock-master or his assistant—assuming those orders to be lawful orders—and obeyed them properly, I do not understand how it can possibly be said that the *Mystery* was to blame; and, on the findings, it appears to me that the dock company are alone liable.

The only point which has been raised, and not covered by the learned judge's judgment in terms, is the question of the authority of the lock foreman who actually gave the order or orders. On the evidence, it appears to me that the learned judge must have held—and I think rightly—that he was a person whose orders could bind the dock company; and it is clear that he was an official of the dock company. He was in uniform, and was there, as he says himself, for the purpose of looking after the barges; and it appears to me quite clear that he was a person authorized to give necessary orders to the barges in going into the docks. He gave, by mistake, a wrong order. Under those circumstances it seems to me impossible to say that he was acting beyond the scope of his authority. It is expressly provided by the regulations of the dock company—No. 17 is the material rule—that not only are the

(1) Rules and regulations of the London and India Docks Company:—

"10. All vessels must be transported to and from the river, and transported to or removed from any part of the dock premises by the persons in charge and their crews under the direction of the dock-master, his assistants, or deputies."

"17. The dock-master, his assistants, or deputies, may at any time give in such manner as he or they may think fit to the master or other person in charge of any vessel any other directions, either in addition to the foregoing directions or by way of alteration or modification thereof."

(2) (1898) 8 Asp. M. L. C. 364.

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regulations with regard to going into dock to be obeyed, but also any other order which is thought fit to be given by the dock-master, or his assistants or deputies. In this case a deputy or assistant of the dock-master gave such orders; and that being so, it appears to me that they were orders given by a person who was the assistant of the dock-master within the meaning of the Harbours, Docks, and Piers Clauses Act. I think, therefore, that the judgment should stand as against the dock company, but ought to be reversed as regards the *Mystery*.

GORELL BARNES J. I have nothing to add to what the learned President has said so far as the judgment against the dock company is concerned; but I think that the judgment of the learned judge in the Court below against the owners of the *Mystery* is founded on a misapprehension. He seems to have considered that the owners were responsible because there was no statutory enactment relieving them from liability as there is in the case of the compulsory employment of a pilot. I think he has fallen into error on that subject.

The case of *The Bilbao* (1), decided by Dr. Lushington, deals with this point, and lays down the principle that the shipowner is not to be held responsible for obeying, under compulsion of a statute, any order of a harbour-master who is a stranger to him. The statute in this case is the Harbours, Docks, and Piers Clauses Act, 1847, incorporated in the defendant company's Act, and under that Act the obligation is imposed of obeying the orders of the dock-master or his assistant. The learned President has dealt with the question of the assistant, and I need not, therefore, say anything on that point; but, according to ordinary principles of law, the dock officials are not the servants of the owners of the *Mystery*, and her owners, therefore, cannot be held responsible for them. I think that the principles upon which *The Halley* (2) was decided are analogous to the present case. As between the *Mystery* and those who gave the orders, the position is not one of master

(1) Lush. 149.

(2) (1868) L. R. 2 P. C. 193.

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THE MYSTERY.

and servant, and therefore, apart from the statute, there is at common law no liability on the owners of the *Mystery*.

Appeal of the owners of the Mystery *allowed.*

Appeal of the London and India Docks Company dismissed.

On the question of costs:—

THE PRESIDENT. I think—following the decision of Lord Hannen in the case of *The River Lagan* (1)—that the plaintiffs acted reasonably in joining both parties as defendants, and that, as the London and India Docks Company threw the blame on the owners of the *Mystery*, the plaintiffs' costs against both defendants, and the costs of the successful defendants here and in the Court below, must fall on the unsuccessful defendants.

Solicitors for appellants (defendants), the owners of the ketch *Mystery*: *Clarkson, Greenwell & Co.*

Solicitors for appellants (defendants), the London and India Docks Company: *Turner, Son & Foley.*

Solicitors for respondents (plaintiffs), the owners of the *William Adamson*: *Charles E. Harvey.*

(1) 6 Asp. M. L. C. 281.

T. L. M.

THE AUGUSTE LEGEMBRE.

1902
Feb. 28.

Admiralty—Salvage—Reward—Tug engaged by salving Tug—Lifeboat Tug towing salved Vessel—Right of Lifeboat Crew to participate.

A steam tug, employed by the National Lifeboat Institution solely for the purpose of towing a lifeboat of that institution, went out with the lifeboat in tow to the assistance of a disabled steam vessel, and, after lying by all night, made fast ahead of the steam vessel and towed her, whilst the lifeboat (with her crew) was towed astern of the steam vessel. Subsequently the services of a second tug were accepted by the master of the steam vessel, and the master of that tug insisted, in spite of the remonstrance of the master of the steam vessel, in taking the services of a third tug, which was made fast ahead of the second tug. The steam vessel was successfully towed to a place of safety.

In an action of salvage it was admitted by the owners of the salved vessel that services were rendered by the two first tugs; but they denied the right of the coxswain and crew of the lifeboat, and of the owners, master, and crew of the third tug, to any award :—

Held, by Gorell Barnes J., that all the plaintiffs were entitled to salvage, for the first tug could not go out without taking the lifeboat with her, and, therefore, for salvage purposes, the crew of the lifeboat were to be regarded as if they formed part of the crew of the tug, though with a more moderate reward. Secondly, the owners, master, and crew of the third tug were to be regarded as salvors, for though the services of that tug were refused by the master of the salved vessel, and, as it turned out, were not in fact required, that tug made fast at the request of the second tug at a time when it was reasonably prudent and necessary for the salved vessel to have the services of a third tug.

ACTION OF SALVAGE.

The plaintiffs were the owners, masters, and crews of the steam tugs *Victor* and *Dragon* of Falmouth, the master and crew of the steam lifeboat *Helen Peele*, and the coxswain and crew of the lifeboat *Edmund Harvey*, both belonging to the National Lifeboat Institution, and stationed at Padstow. The defendants were the owners of the French steam vessel *Auguste Legembre*.

The services in respect of which salvage remuneration was claimed were rendered by the plaintiffs to the French steam vessel off the coast of Cornwall and in the Bristol Channel on

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December 14, 15, and 16, 1901, under circumstances which fully appear in the judgment.

By their defence the owners of the *Auguste Legembre* admitted that salvage services had been rendered by the tug *Victor* and the steam lifeboat *Helen Peele*; but they denied that salvage services were rendered by the tug *Dragon* or the lifeboat *Edmund Harvey*, and the case is reported on the question, under what circumstances a tug employed by a salving tug, against the will of the master of the salved vessel, can claim a salvage reward; and, secondly, as to the claim of the crew of a lifeboat who are not employed as salvors, but are towed in their lifeboat astern of the salved vessel, whilst the tug which took the lifeboat out—and which is only used for the purpose of towing the lifeboat—tows the salved vessel.

Aspinall, K.C., and *H. Stokes*, for the plaintiffs.

Laing, K.C., and *Dawson Miller*, for the defendants, the owners of the *Auguste Legembre*.

GORELL BARNES J. This is a salvage case in which there are several plaintiffs, namely, the owners, masters, and crews of the steam tugs *Victor* and *Dragon*, the master and crew of the lifeboat steam tug *Helen Peele*, and the coxwain and crew of the lifeboat *Edmund Harvey*.

The action is brought against the owners of the *Auguste Legembre*, a French screw steamer belonging to Algiers, of 2603 tons gross register, on a voyage from Barrow-in-Furness to Port Talbot in water-ballast, manned by a crew of twenty-six hands. On December 12 last she appears to have met with very severe weather in Cardigan Bay, with this unfortunate result, that a manilla warp was washed overboard and became entangled in her propeller, and the engines were brought up and could not be worked any more. From that time onwards she drifted before the force of the gale, and apparently touched on the rocks known as the Hats and Barrels, receiving some damage, so that No. 2 hold began to fill with water, until at last the water inside was level with the sea outside. Some water also made its way into the engine-

room, but that appears to have been kept down by the pumps, and it could not come in very rapidly because the water-tight doors were shut down, and the bulkheads between No. 2 hold and the engine-room appear to have been more or less water-tight. The vessel drifted on right across the entrance to the Bristol Channel, and ultimately brought up with both anchors, in a position about fifteen miles to the westward of Trevose Head, on December 13. There she lay throughout the night of the 13th and throughout the 14th, on both of which days the weather, according to the records put in, was extremely severe, going up at times, according to some of the reports, to force 10, and even 11 on one occasion, I think on the 13th. At any rate, it was exceedingly severe weather, and the wonder of it is that she held to her anchors in that position.

The vessel appears to have been noticed from the shore, although there is no evidence from anybody who saw her that any distress signals were exhibited by her. It is possible that some lights which were mentioned by the master as being used for lighting up the deck when they were clearing away the débris and getting to an anchorage were mistaken for distress signals; but it seems clear from his evidence that no distress signals were in fact given, and none were stated by the salvors to have been seen on their approach. However, news of the ship reached the different plaintiffs by telegram or otherwise, and first of all the *Helen Peele*, which is a tug-boat belonging to the National Lifeboat Institution, stationed at Padstow, manned by eleven hands, and of the large value of 10,500*l*., went out, towing the lifeboat *Edmund Harvey*, which is a lifeboat belonging to the same institution, also stationed at Padstow, manned by a crew of fifteen men, and of the value of 1500*l*. They reached the vessel at anchor on the evening of December 14. There is a conflict as to what took place when they arrived, which is very possibly due to the fact that those on board the tug and the lifeboat spoke English, and the master of the *Auguste Legembre*, a Frenchman, spoke English words only slightly. It may be that accounts for some discrepancy as to what took place. But one thing is clear, namely, that the master of the ship at that time said he

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did not want assistance. What is in dispute is whether he said "stand by," or "we will wait till morning to see about a tug." My impression is that what he really meant was that they would see about towage in the morning, though what he said may have been construed at the time to mean wait until the morning simply.

On the following morning the *Edmund Harvey* was, at the time when the *Helen Peele* was making fast, made fast to the *Auguste Legembre*, and there is a dispute as to what took place with regard to that. The witnesses from the lifeboat suggested that they were made fast because it was said that the steamer was sinking. I do not think that is in accordance with the facts. It looks to me more probable that she was made fast, as the master of the steamship says, because she could not remain astern of the tug, if the tug was taking the steamer in tow. However, she was made fast astern of the steamer, and there she remained until they got into Cardiff Roads. On the morning of the 14th the *Victor* and the *Dragon*, which are tugs belonging to Falmouth, had heard of this vessel being in difficulties. The *Victor* is a tug worth 7000*l.*, and the *Dragon* is worth 6000*l.* They proceeded out from Falmouth and round Land's End. At first the weather was so bad that they had to put back into Mount's Bay, but finally they reached the *Auguste Legembre* on the 15th, and the services of the *Victor* were accepted. At that time, as far as I can understand the evidence, the anchors of the steamer were being or had been got up, with the object of the *Helen Peele's* taking her in tow. That shews, to my mind, that the weather had moderated extremely at that time, because it would be hardly likely that they would trust to that tug alone if the weather remained exceedingly severe, and get their anchors up with her assistance only. However, the *Victor* was taken at once and made fast, and the *Victor* and the *Helen Peele* proceeded to tow and towed for a considerable time. In the meantime the *Dragon* was endeavouring to persuade the master of the vessel to allow him to tow too, but the master of the steamer did not seem to see it in the same light. He thought he had enough assistance, and refused any assistance from the *Dragon;*

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but the end of it was that the master of the *Victor* shouted through the megaphone that he would not tow without a third tug, and did not get any answer, or any intelligent answer, though the master of the steamship says he kept saying that he would not have a third tug. Whether those answers reached the *Victor* does not seem to be at all clear. The end of the discussion was that, as the master of the *Victor* says, the *Dragon* was put ahead because he wanted him. I think the evidence seems to shew that at that time it was not in one sense absolutely necessary to have more than two tugs towing, but that they wanted to have a third tug—at least, the *Victor* wanted to have a third tug—in case it was wanted afterwards. With the assistance of the three tugs the vessel was brought on the 16th to Cardiff Roads in safety.

Now comes the claim for salvage, which has to be considered. The value of the French steamer is 11,400*l*. That property was undoubtedly placed in safety by the efforts of the salvors. The main question is the danger from which the vessel was rescued, and the risks which were run in effecting that rescue. So far as the weather is concerned there is no doubt that before any actual towage was rendered the wind had abated considerably, and it was moderate weather, though there was probably considerable sea still running, but going down as the wind fell. It is remarkable that the vessel had ridden out the severe weather and had never moved from her anchors, but still she could not get away from that position, and it was absolutely necessary she should have towage assistance. The tugs did it satisfactorily, and a reasonable and proper award must be given for that service. The real contest is only as to the amounts that ought to be awarded to the *Victor* and to the *Helen Peele*, and as to whether anything ought to be awarded to the men in the lifeboat *Edmund Harvey* and to the *Dragon*. I need not say anything about the *Victor*, except to give later on the amount which I think the proper sum to award to her. With regard to the *Helen Peele* there is this remark to make—that I do not think the case can be treated exactly as if the eleven men in the *Helen Peele* owned her. We are told that these men are to be treated in the same way as an ordinary lifeboat

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service is treated; that is to say, they take the salvage and run the risk of paying for any damage to the tug or the lifeboat. I am not sure that it is a very satisfactory state of things with regard to such a large and valuable tug as the *Helen Peele*, and I should suggest that the matter is one that the National Lifeboat Institution should consider. At any rate, the case is to be so treated on the present occasion. I can understand an ordinary lifeboat service being dealt with on that footing, but it seems to me hardly applicable to the case of a tug of this character. I think I must deal with this case on the footing of men who had rendered a service and were liable for any repairs that had to be done. In this case the liability probably was not very great, because, although they went out in very bad weather, the vessel is built for the purpose, and after she got there there does not seem to have been any unusual risk in the towage, because it did not commence until the weather had moderated. So much for the *Helen Peele*.

With regard to the lifeboatmen, I think they are entitled to be considered in the salvage award on account of the peculiar circumstances under which they had to render their services. We are told that the tug would not be allowed to go out without the lifeboat; that is to say, she is built for that express service, and the rule is that she has to tow out the lifeboat. Practically the lifeboatmen had to keep with her, and she had to keep with the lifeboat. It seems to me as if this case ought to be treated as if the lifeboatmen formed part of the crew of the tug—not really, but it is analogous to that. Therefore, I cannot come to the conclusion that they are not to be treated as in any sense instrumental in salving property.

With regard to the *Dragon*, the question is one partly of law and partly of nautical skill. It is a legal question in this sense, that although the tug's services were not directly accepted, but in fact were refused, by the master of the steamship, the tug did at the request of the *Victor* make fast ahead for the reasons I have given, and rendered a towage service of a valuable character towards Cardiff; and, legally speaking, if those services were rendered in such circumstances that they ought to have been accepted, although, according to his evidence, the

master of the steamship did not wish to have them, yet an award would be made of some amount, on the well-known principle. Therefore I think it would be a nautical question whether, having regard to the circumstances of the case, and what might be anticipated at that time of year and in that locality, it was reasonably prudent and necessary to have a third tug. The Elder Brethren think it was, because, although the weather had moderated, it was in the middle of December, when the wind seems to have been flying about from quarter to quarter, and no one could be certain as to what would take place before they got to Cardiff. That is the reason why the *Victor* took this third tug ahead, and although I think in fact it did not turn out to be necessary, it was a reasonable thing to do. Therefore the *Dragon* must not be excluded, although the award should be of a moderate character.

Taking all these circumstances into consideration, the award which I make to the various salvors is the sum of 1000*l.*, and that I divide in this way: to the *Victor* 500*l.*, the *Helen Peele's* men 325*l.*, the *Dragon* 100*l.*, and the lifeboatmen 75*l.*

Solicitors for plaintiffs: *Thomas Cooper & Co., for William Jenkins, Falmouth.*

Solicitors for defendants: *Botterell & Roche.*

T. L. M.

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Jan. 22;
Feb. 12, 13;
March 26.

[IN THE COURT OF APPEAL.]

BIRCH *v.* BIRCH.

Res Judicata—Action to set aside Judgment—Alleged Fraud—Revocation of Probate—Nature of Evidence necessary to maintain Action—Motion to stay Proceedings.

In order to maintain an action to set aside, on the ground of fraud, a judgment establishing a will and granting probate of it, the plaintiff must adduce evidence of facts discovered since the judgment which raise a reasonable probability of the success of the action.

If the plaintiff does not do this, the proceedings in the action will be stayed on the motion of the defendant.

Per Vaughan Williams L.J.: The evidence need not necessarily be of such a character that it would be evidence in the action. The question in each case is, whether the fact alleged to have been discovered is so evidenced and so material as to make it reasonably probable that the action will succeed. If it is, the action ought to be allowed to proceed, so that the plaintiff may have an opportunity of obtaining discovery in it.

Per Cozens-Hardy L.J.: Though in most cases a judgment obtained by fraud can be set aside only as against the person who committed or procured the fraud, this limitation does not apply to an action to set aside a judgment granting probate of a will, inasmuch as a will must be either good or bad against all the world.

Judgment of Gorell Barnes J., ante, p. 62, refusing to stay proceedings in an action to set aside, on the ground of fraud, a judgment establishing a will, reversed, fresh evidence having been adduced upon the appeal.

APPEAL against the decision of Gorell Barnes J. (1)

Inasmuch as some fresh evidence was adduced in the Court of Appeal it is necessary to restate the facts.

The following statement is taken from the written judgment of Cozens-Hardy L.J.:—

The facts, so far as they are admitted or proved beyond question, may be shortly stated. Arthur Birch died in April, 1899. No will being forthcoming, letters of administration were granted to Walter George Birch, Edwin Birch, and Jesse Joseph Birch. In December, 1899, two actions were brought, one by Mrs. Ada Rose Guise as plaintiff against the three administrators, and Charles Birch and Henry Birch as defendants; and

(1) Ante, p. 62.

the other by Edwin Birch, Jesse Joseph Birch, and Amy Birch as plaintiffs against Walter George Birch as defendant. These actions were consolidated. Each action claimed revocation of the letters of administration, and probate was claimed of an alleged will of December 18, 1897, or, alternatively, of alleged instructions for a will dated December 8, 1897. The document of December 18 was the first which was produced, it being forwarded from America by one Sanders, who, with one Ford, appeared to be the attesting witnesses. The instructions, which were subsequently forwarded from America, purported to be attested by the same two witnesses, and also by a Mr. Barnes. Walter George Birch pleaded that both of these documents were not signed by the deceased, or by any one at his direction, and that they were not executed according to the provisions of the statute. The consolidated action came on for trial before the President (Sir F. Jeune) without a jury on June 22, 1900. Neither Sanders nor Ford was forthcoming The existence of such a person as Ford was challenged. Expert evidence as to handwriting was given for and against the will. Barnes, however, was called as a witness, and was severely cross-examined; and in the result the President pronounced for the force and validity of the will of December 18, and ordered the letters of administration to be revoked. So far as appears, all the next of kin were parties to the consolidated action.

The present action was commenced by W. G. Birch, as plaintiff, against Edwin Birch and Amy Birch, the executors of the will, and it asked that the probate of the pretended will of December 18, 1897, might be revoked. The writ has since been amended by adding the next of kin, and also Henry Guise, the husband of Ada Rose Guise, as defendants. The statement of claim contains the following allegations: "(3.) The said judgment was obtained against the plaintiff by the fraud of Frederick Charles Barnes, Alfred Sanders, and a person passing by the name of W. G. Ford, and Henry Guise, the husband of Ada Rose Guise, one of the plaintiffs in the aforesaid consolidated action. (4.) In July, 1899, the said Alfred Sanders, at the instigation of and in conjunction with the said Henry Guise,

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drew up and forged the pretended will dated December 18, 1897. The said Alfred Sanders, in pursuance of the said fraud and at the expense of the said Henry Guise, went to Baltimore, United States of America, and from there wrote a letter, dated August 28, 1899, falsely describing the circumstances under which the said pretended will was executed. (5.) In September, 1899, in further pursuance of the said fraud, the said Alfred Sanders drew up and forged a document purporting to be a will executed by the said deceased on December 8, 1897. The said Alfred Sanders was instigated to draw up and forge the said document, dated December 8, 1897, by the said W. G. Ford, acting on behalf of and as the agent of the said Henry Guise. The said Alfred Sanders, W. G. Ford, and Frederick Charles Barnes fraudulently signed the said document as attesting witnesses to the due execution thereof by the said deceased. (6.) In pursuance of the said fraud the said Henry Guise and Frederick Charles Barnes falsely represented upon oath to the Court that they were strangers to and unacquainted with each other prior to on or about July 29, 1899. (7.) In further pursuance of the said fraud the said Henry Guise and Frederick Charles Barnes concealed from the Court the fact that the said W. G. Ford had been in personal communication with the said Alfred Sanders between July 13, 1899, and November 15, 1899." The defendants moved before Gorell Barnes J. to stay proceedings in this action. No evidence was filed in support of the motion; but the plaintiff filed an affidavit by himself stating that the will of December 18 was entirely in the handwriting of Sanders, and verifying a letter, dated September 10, 1900, from a Mrs. Smith, of San Francisco, addressed to the authorities at Scotland Yard, inclosing what purported to be a confession by Sanders that he had forged the will at the suggestion and with the help of the defendant Henry Guise, then Henry Bagley. In this state of things Gorell Barnes J. held that the Court had jurisdiction to set aside the judgment obtained by fraud, and that the action must be allowed to proceed. He directed that Henry Guise should be added as a defendant, and this was done. Some of the defendants appealed. On the appeal an opportunity was afforded to the parties to adduce further evidence,

the nature of which I may shortly state. There was expert evidence, to which I do not attach any great importance, as to the letter inclosing the confession and the confession itself being in the handwriting of Sanders, who also wrote the will. There was evidence intended to prove, or at least to suggest, that Barnes was well known to Henry Guise (formerly Bagley) before the so-called accidental meeting, and, indeed, that there had been previous monetary transactions between them. On the other hand, Barnes and Henry Guise made affidavits entirely denying this, reasserting the truth of the evidence which they gave at the trial before the President, and suggesting that a mistake had been made between Henry Bagley and his brother, James Bagley. The latter, who appears to be a respectable witness, has made an affidavit stating his own connection with Barnes, and thus confirming to some extent the evidence of Barnes and Henry Guise.

Jan. 22. *C. A. Russell, K.C.*, and *Whitmore L. Richards*, for the appellants. When an action is brought to set aside a judgment on the ground of the discovery of fresh evidence, the plaintiff must indicate to the Court the evidence in his possession by which he proposes to support the action; and if the Court thinks that there is no probability of the action succeeding, it will not allow it to proceed: *Boswell* v. *Coaks*. (1) The present plaintiff fails to shew that he has discovered any new evidence such as to make it probable that the action would be successful. There are no materials to shew that the alleged confession is genuine.

The Court ordered the appeal to stand over to enable the plaintiff to obtain further evidence.

Feb. 12. Fresh evidence having been filed, *Inderwick, K.C.*, and *Willock*, for the plaintiff, discussed the new evidence.

A. H. Chaytor, for the defendant Henry Guise, submitted that the evidence was still insufficient.

C. A. Russell, K.C., in reply. The alleged confession may

(1) (1894) 6 R. 167.

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be a fabrication, and at any rate it is not evidence. Beyond that, there is no evidence that the will has been forged. Some of the affidavits are founded on information and belief, and the source of the information and belief is not stated. They are, therefore, inadmissible: *In re J. L. Young Manufacturing Co.* (1) There is really no new evidence at all. This case falls within the principle of *Hungate* v. *Gascoyne*. (2)

Feb. 13. *Whitmore L. Richards*, (in the absence of *C. A. Russell, K.C.*) was allowed by the Court to continue the reply. The plaintiff is seeking to reopen the issue which was raised in the former proceedings and was then solemnly decided by the Court. It is admitted that there is jurisdiction to set aside a judgment obtained by the fraud of persons who were parties to it: *Flower* v. *Lloyd* (3); *Wyatt* v. *Palmer*. (4) In the present case the defendant Henry Guise was not a party to the former action, and the parties to that action had nothing to do with the alleged fraud. There is no authority which shews that under such circumstances an action can be brought to impeach the former judgment. It is not alleged that there was any fraud in obtaining the judgment. The fraud alleged was in procuring the will, and it was directly involved in the issue determined in the former action. The plaintiff is estopped by that judgment as res judicata: *Priestman* v. *Thomas*. (5) The alleged new facts go only to shew who committed the forgery and who procured it, and that two of the witnesses committed perjury. As regards the new facts, the procedure is analogous to that on a motion for a new trial: *Young* v. *Kershaw*. (6) The rule as to the evidence necessary to justify the Court in allowing an action to set aside a judgment to proceed is the same as that which governed an application for leave to file a bill of review in the Court of Chancery. The plaintiff must shew that he could not with reasonable diligence have discovered the new facts sooner, and that they are so material that, if they had been adduced at the trial, they would

(1) [1900] 2 Ch. 753.
(2) (1846) 2 Ph. 25.
(3) (1877) 6 Ch. D. 297.
(4) [1899] 2 Q. B. 106.
(5) (1884) 9 P. D. 70, 210.
(6) (1899) 81 L. T. (N.S.) 531.

in all reasonable probability have led to a different result: *Young* v. *Keighly* (1); *Flower* v. *Lloyd* (2); *Boswell* v. *Coaks* (3), *Hungate* v. *Gascoyne* (4); *Thomas* v. *Rawlings* (*No.* 3). (5) The evidence adduced by the plaintiff is not sufficient. Some of it is based only on information and belief, and the alleged confession is not admissible evidence: *In re J. L. Young Manufacturing Co.* (6) Mere allegations of perjury by the witnesses on whom the President relied in the former action are not enough to support the present action: *Flower* v. *Lloyd* (7); *Baker* v. *Wadsworth.* (8) On a motion for a new trial on the ground of the discovery of new facts, the evidence must be such as would materially affect the result of the former trial: *Anderson* v. *Titmas* (9); *Young* v. *Kershaw.* (10) At any rate, that which is alleged constitutes a criminal offence, and the proceedings in the action should, it is submitted, be stayed until the alleged criminal has been prosecuted to a conviction: *Appleby* v. *Franklin.* (11) [He also referred to *Thurtell* v. *Beaumont.* (12)]

Cur. adv. vult.

March 26. VAUGHAN WILLIAMS L.J. read the following judgment:—We think that the judgment of Gorell Barnes J. must be reversed, but it is right to state that the evidence before us is very different from that before him. The question, which in form has to be decided in the present case, is whether or not the action ought to be stayed as being frivolous and vexatious, and whether the statement of claim ought to be struck out as disclosing no cause of action. Now, as to the former part of the question—that is, whether the action is frivolous and vexatious—one is bound to include as an element to be considered the fact that there has already been a judgment binding the plaintiff, affirming the signature of the will

(1) (1809) 16 Ves. 348.
(2) 6 Ch. D. 297, 300.
(3) 6 R. 167.
(4) 2 Ph. 25.
(5) (1864) 34 Beav. 50.
(6) [1900] 2 Ch. 753.
(7) (1879) 10 Ch. D. 327.
(8) (1898) 67 L. J. (Q.B.) 301.
(9) (1877) 36 L. T. (N.S.) 711.
(10) 81 L. T. (N.S.) 531.
(11) (1885) 17 Q. B. D. 93.
(12) (1823) 1 Bing. 339; 25 R. R. 644.

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of December 18, 1897, to be the signature of the testator Arthur Birch, and by necessary implication the attestation by the witnesses of the will, and by the terms of the judgment as delivered the attestation of the instructions of December 8 for the will. And I think that the Court ought to treat as frivolous and vexatious any cause of action in support of which the plaintiff does not produce evidence of facts discovered since the former judgment which raise a reasonable probability of the action succeeding. But I do not think that it can be laid down as a hard and fast rule that the evidence thus produced must be of such a character that it would be evidence in the action itself. I can quite conceive of a case in which there was evidence of a fact, which would not be evidence in the action itself, but which would nevertheless make it impossible to say that there was not a reasonable prospect of the action to set aside the judgment being successful. Suppose the case of a judgment based on the validity of a document vouched by one witness alone; suppose that that witness had sent to the police authorities a confession that the document was forged by him; suppose that that witness had written to say that he desired to return from abroad to give himself up for trial for the offence of forgery; suppose that he had actually taken ship for the purpose of coming to England and surrendering for his trial; and suppose that he was accompanied by an English police officer sent to meet him; suppose then that the ship is reported as lost; none of the matters included in this hypothetical case could be used as evidence on the trial of the action. But I do not think that it would be possible to describe the action as frivolous and vexatious, nor do I think that in such a case the weight to be given to the principle interest reipublicæ ut sit finis litium is such as to compel the Court to stay as frivolous and vexatious an action brought to set aside a judgment. I should think that in such a case the action ought to go on, so as to give the plaintiff the opportunity of discovery in the action. Nor do I think that in such a case the discovery could properly be described as fishing. But in each case it is a question of degree. Is the fact alleged to have been discovered so evidenced and so material as to

make it reasonably probable that the action will succeed? If it is, I think the action ought not to be stayed. In the present case my brethren do not think that the evidence of the handwriting of Sanders and the contents of the letter forwarded to the police are sufficient, even in a case in which the evidence which led to the judgment raised in the mind of the judge who tried the case considerable doubt, if not suspicion, and I do not think I ought to differ from them on such a question.

STIRLING L.J. I have had an opportunity of reading the judgment of my brother Cozens-Hardy, and I entirely agree with it.

COZENS-HARDY L.J. read a judgment, in which, after stating the facts as above, he continued:—Now, it is plain that in the action tried before the President the distinct issue was raised whether the alleged will was signed by Birch. The judgment in that action is binding upon the plaintiff, unless and until it is set aside. This is not an appeal by the plaintiff from that judgment, or an application for a new trial. The present action is an independent proceeding to set aside that judgment on the ground that it was obtained by fraud. I do not doubt that such an action may be maintained, at least when the judgment has been procured by the fraud of a party to the action. Here Henry Guise, against whom fraud is alleged, was acting for and as the agent of his wife, who was a party, and she must be affected by his fraud. In *Boswell* v. *Coaks* (1) A. L. Smith L.J., who delivered the judgment of the Court of Appeal, after dealing with the case against the defendant Coaks, who was alone charged with the fraud, proceeded as follows (2): "As regards the point taken by the Solicitor-General for the other defendants—viz., that the judgment can only be set aside, if at all, against those who procured it by fraud,—and it is not suggested that the other defendants had anything to do with the fraud alleged,—this point appears to

(1) 6 R. 167.

(2) This passage was quoted from the print of the judgment of the Court of Appeal contained in the Appendix to the cases on the appeal to the House of Lords.—W. L. C.

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us to be fatal as regards all the defendants except Coaks, and we think it would be fatal to any further action to set aside the sale of the whole." But I do not think this limitation can apply to a probate action. The will is either good or bad against all the world. The defendants other than Mrs. Guise cannot, therefore, rely upon their not having had anything to do with the fraud of Mrs. Guise's agent. The judgments of the Court of Appeal and of the House of Lords in *Boswell* v. *Coaks* (1) contain some important observations as to the mode in which a motion such as that which is now before us ought to be dealt with. Lord Selborne points out that it is not sufficient for the plaintiff to allege fraud. It is the duty of the Court to receive such evidence, pro and con, as is material to the question whether there really has been, since the former judgment, a new discovery of something material to disturb the former judgment; and A. L. Smith L.J. states that the plaintiff must shew a reasonable possibility of the alleged fraud being established. It is plain that paragraph 3 of the statement of claim is of no importance. A mere general allegation of fraud, without particulars, cannot avail. As to paragraphs 4 and 5, they are based solely on the alleged "confession." But, assuming that document to be written by Sanders, there is no possible mode of making it evidence in the present action. It is not known whether Sanders is alive, and there is no reasonable possibility of the alleged forgery being established. As to paragraph 6, this allegation does not seem to me to be directly material to the judgment. It only goes to the credit of two of the witnesses who were examined and cross-examined on this very point. It would be highly dangerous to allow a solemn judgment to be set aside on the ground of alleged perjury by witnesses dealing with a collateral point, more especially when the alleged perjury is absolutely, and with considerable appearance of probability, denied. Upon the whole I have come to the conclusion that, upon the materials before us, which are different from those before Gorell Barnes J., this motion ought to succeed. It is not for us to say whether the President arrived at a right decision

(1) 6 R. 167.

upon the evidence before him. That must be assumed in the absence of an appeal. If the present plaintiff were appealing, and all questions of time were got rid of, he might apply for leave to adduce further evidence on the appeal. But I think such an application must have failed. Such a document as the alleged confession, which cannot be adduced in evidence, must be wholly disregarded. No documentary evidence recently discovered is suggested. A mere suspicion is not sufficient. The supposition which I have made of an appeal, coupled with an application to adduce fresh evidence, is probably too favourable to the present plaintiff. Certainly the plaintiff cannot be in a better position when he seeks to set aside a solemn judgment. The importance of finality in litigation is very great; and I think it would be wrong to allow the issue to be again tried between these parties as to the validity of the will, which has been admitted to probate. In my opinion the order of Gorell Barnes J. should be discharged, and an order made in the terms of the notice of motion, and the plaintiff must pay the costs here and below.

Appeal allowed.

Solicitors: *E. W. Reeves; J. W. Reid.*

W. L. C.

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HILL *v.* HILL.

Husband and Wife—Maintenance—Step-children—Liability to maintain—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *s.* 4.

A husband, who has been separated from his wife under an order made under the Summary Jurisdiction Act, 1895, by a Court of summary jurisdiction, is liable to be ordered to make his wife an allowance for the support of her children by a former marriage.

THIS was an appeal by the husband, Frederick Penton Hill, from an order made on January 31, 1902, after a hearing before a bench of seven magistrates of the petty sessional division of Southampton, sitting at the Hampshire County Buildings, Southampton, whereby the appellant was ordered to pay the weekly sum of 17*s.* for the maintenance of his wife, Alice Matilda Hill, and the weekly sum of 13*s.* for the support of her three children, two of whom were by her former husband and now aged eleven and seven respectively.

The appellant sought to have the order varied by omitting the direction to pay the 13*s.*, or, in the alternative, by reducing both the amounts.

The grounds of the appeal were that the appellant was not legally liable to maintain his step-children, and that the justices were in error and exceeded their jurisdiction in taking these children into account in fixing the amount of maintenance to be allowed to the wife; and, further, that having regard to the means of the wife and of the husband, the weekly sums ordered were excessive and unreasonable.

The order now appealed from was the outcome of an application by the husband, under s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, for a reduction of the amount of 30*s.* per week ordered to be paid to the wife under an order of April 19, 1901. The justices refused to make any reduction in the sum total to be paid by the husband; but, for the purpose of raising clearly and distinctly the point as to the step-children, they varied the former order and directed "that instead of the

weekly sum of 30*s.*" previously ordered to be paid by the husband to the wife, the husband should until further order "pay to his said wife the weekly sum of 17*s.* for the use of his said wife, and the weekly sum of 13*s.* for the support of her children. . . ."

R. H. Pritchard, for the appellant.
Barnard, for the respondent.

JEUNE P. This appeal is brought mainly in order to settle a rather difficult question, namely, as to the liability of a husband for the support of the children of his wife by a former marriage. We are told that the justices framed their order in its present form in order to raise this specific question.

But, although it is so raised, I am not sure that its determination is necessary for the validity of the decision of the justices; because, although it may be a question how far the husband may be liable to maintain his step-children, this, at any rate, is clear, that there is a measure of liability for their support attaching to him by virtue of the poor law. Whether that liability under the poor law results in any obligation of wider scope, either at common law or by virtue of implied authority to the wife, or whether that obligation is extended by 4 & 5 Will. 4, c. 76, s. 57—as, indeed, the section in its terms seems to me to shew—there is clearly an obligation on the husband under the poor law to support these children.

This appears to me to have been recognised in the Summary Jurisdiction (Married Women) Act, 1895; for the Act which it superseded—the Married Women (Maintenance in Case of Desertion) Act, 1886 (49 & 50 Vict. c. 52)—clearly made the husband liable, and in terms gave the magistrates power to make an order for the maintenance, not only of the wife, but "of her family"—words obviously large enough to cover the case of children by a former husband.

It is quite true that the Summary Jurisdiction (Married Women) Act, 1895, repeals that Act of 1886, without re-enacting expressly the same language; but s. 4 provides that the power to make orders is given if the husband fails to "provide

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reasonable maintenance for her and her infant children whom he is legally liable to maintain."

Without going further, I hold that these step-children are persons whom he is bound to maintain and for whom an allowance ought to be made.

When we look at the powers conferred by later portions of the Act of 1895, we see that the husband may be ordered to pay "to the applicant personally, or, for her use, to any officer of the Court or third person on her behalf such weekly sum not exceeding 2*l.* as the Court shall, having regard to the means both of the husband and wife, consider reasonable": s. 5 (*c*). Therefore the whole sum ordered is to be paid to the applicant personally. There is in the Act no express power to order that sums shall be paid for children, even the children of his (the husband's) own marriage. But, in considering what amount should be ordered to be paid by the husband, if the justices were right in taking into account the expenses of maintaining any child or children of the marriage, they would be equally justified in taking into account the expenses in respect of children whom the husband, under the poor law at any rate, was legally liable to maintain, and they were right in ordering such amount to be paid—as only it could be paid—to the wife. That leaves only the point whether the amount ordered was excessive. [The learned President reviewed the facts.] I am not prepared to say that it was. The appeal will, therefore, be dismissed with costs.

GORELL BARNES J. I do not think I can usefully add anything to the judgment of the President, in which I concur.

Appeal dismissed.

Solicitors for husband (appellant): *Bramall, White, Sanders & Roberts, for Page & Gulliford, Southampton.*

Solicitors for wife (respondent): *W. & W. Stocken, for E. D. Godwin & Son, Southampton.*

H. D. G.

ROBERTS *v.* BRENNAN. ([1902] P. 143; 86 L.T. 599). *Disapproved.* DE RENEVILLE *v.* DE RENEVILLE .. .. [1948] 1 All E.R. 56
Not [1949] P. 100.

ROBERTS (FALSELY CALLED BRENNAN) *v.* BRENNAN.

1902
March 22, 24.

Nullity Suit—Matrimonial Residence—Jurisdiction.

Matrimonial residence within the jurisdiction is sufficient to give the Court power to declare a bigamous marriage null and void, even though the domicil of the respondent be Irish and the de facto marriage celebrated in the Isle of Man.

THIS was a petition by Margaret Roberts for a declaration that the ceremony of marriage which she went through with Christopher Brennan on September 19, 1898, at St. Matthew's Church, Douglas, in the Isle of Man, was null and void on the ground that, as she had since learnt from him, he then had a lawful wife living.

The domicil of the respondent was in Ireland, where he was served with the citation; the petitioner was born in Wales; and they lived together in the Isle of Man, and in England and Scotland. The respondent's first and legal marriage was solemnized in Liverpool.

In consequence of what the respondent told the petitioner, in May, 1901, she left him in Glasgow, and, having made inquiries as to the truth of what he had said to her, she instituted these proceedings, which were undefended.

The validity of the marriage in the Isle of Man having, by leave, been proved by the affidavit of the Attorney-General of the island,

R. H. Pritchard, for the petitioner, asked for a decree. Residence is sufficient to found jurisdiction in suits for nullity. The Ecclesiastical Courts would have entertained such a petition as this: *Harford* v. *Morris*. (1) This Court must follow the practice that would have been adopted in such a case in the Ecclesiastical Courts: Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 22. [He also referred to s. 42

(1) (1776) 2 Hagg. Cons. 423.

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ROBERTS v. BRENNAN.

of that Act, and to *Armytage* v. *Armytage* (1); *Niboyet* v. *Niboyet* (2); *Le Mesurier* v. *Le Mesurier* (3); and *Morse* v. *Morse*. (4)]

JEUNE P. Although *Niboyet* v. *Niboyet* (2) is now of discredited authority as applied to suits for dissolution of marriage, the judgment in that case in the Court of Appeal still applies in such a case as this. In my view, residence—not domicil—is the test of jurisdiction in a nullity case. The jurisdiction of the Ecclesiastical Courts was based on the residence of the parties, and in suits for nullity this Court follows the practice of the Ecclesiastical Courts, as prescribed by s. 22 of the Matrimonial Causes Act, 1857. The facts of the case having been established, I pronounce a decree nisi, with costs.

Solicitors: *Pritchard, Englefield & Co., for Earle & Sons, Manchester.*

(1) [1898] P. 178, 180.
(2) (1878) 4 P. D. 1.
(3) [1895] A. C. 517.
(4) (1828) 2 Hagg. Ecc. 608.

H. D. G.

KIRK *v.* KIRK.

1902
May 5.

Permanent Maintenance—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 32—*Gross Sum—Payment to Petitioner.*

The Court ordered a gross sum of money to be paid to a petitioner by way of permanent maintenance.

MOTION upon registrar's report as to permanent maintenance.

The petitioner (wife) obtained a decree dissolving her marriage with the respondent. There was no issue of the marriage.

A petition for permanent maintenance was presented on July 9, 1901, and was duly served on the respondent, who filed an answer thereto on September 6, and a further answer on November 19.

On January 1, 1902, an order was made and was in due course served personally upon him for the production of all books, vouchers, and other documents relating to his income for the past three years, and to attend for cross-examination ten days after such production.

As he failed to comply with this order, his answer was directed to be struck out, and leave was given to the petitioner to prove the facts alleged in her petition by affidavit.

It appeared that the respondent derived from business and from various investments enumerated in the petition for maintenance an income of 1471*l.*, and that he had moneys in hand and property together of the value of about 21,300*l.*, which, if invested at 4 per cent., would bring in a further 721*l.* a year.

The registrar submitted "that the respondent do secure to the petitioner the sum of 721*l.* a year during their joint lives, or a gross sum of money of 6000*l.*"

Upon motion to confirm the registrar's report, the respondent was not represented.

Barnard, for the petitioner, asked that an order should be made for the 6000*l.*, and that it should be paid to the petitioner.

[GORELL BARNES J. Is there any precedent for that?]

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Morris v. *Morris* (1) is the only one reported. The registrar seems to limit his recommendation as to annuity to the "joint lives," but there is power under s. 32 of the Act of 1857 to order a gross or an annual sum to be secured for the period of the petitioner's life.

GORELL BARNES J. ordered that a gross sum of 6000*l.* be paid by the respondent to the petitioner.

Solicitors for petitioner: *King, Wigg & Co.*

H. D. G.

1902

May 5.

WOOTTON-ISAACSON *v.* WOOTTON-ISAACSON.

Divorce—Variation of Settlements—Petition by Guilty Party—Jurisdiction to entertain.

Semble, the Court has power to entertain a petition for variation of settlements at the instance of the party through whose misconduct the marriage has been dissolved.

If a wife is in receipt of an allowance derived from funds settled by the husband, and if out of that allowance she keeps up their joint establishment, the husband is not entitled to a reduction of the wife's allowance after she has obtained a divorce by reason of his cruelty and adultery.

THIS was a motion to vary the registrar's report upon a petition presented by the husband for variation of the marriage settlement.

It appeared that on June 19, 1901, the marriage was dissolved at the suit of the wife by reason of the cruelty and adultery of the husband, who on November 4, 1901, filed the present petition.

By a post-nuptial settlement dated April 30, 1898, the husband assigned certain property to trustees upon trust out of the income therefrom to pay to the wife during her life for her separate use without power of anticipation an annuity of 2000*l.*, to abate proportionately in case the total income from the trust property should fall below 3000*l.* a year, with the further proviso that the yearly sum to be paid to the wife should in no case be less than 1500*l.*

(1) (1861) 31 L. J. (P. & M.) 33.

The concluding paragraphs of the husband's petition were in the following terms: "That it was the intention of the parties and a common understanding at the time the settlement was made that the said Jane Wootton-Isaacson would out of the said sum of 2000*l.* so payable to her bear and pay the expenses of the joint establishment of your petitioner and his wife." "That the said Jane Wootton-Isaacson has no separate estate, and that the total income of your petitioner amounts to 4700*l.* per annum."

The prayer simply asked that the Court would "be pleased to vary the said settlement."

The wife filed an answer admitting the execution of the settlement, but stating that she did not admit the husband's income to be only 4700*l.*, and that she believed it to be more.

Upon the matter coming before the registrar, he expressed the opinion that he had no jurisdiction to entertain such a petition at the instance of the guilty party; that there was no precedent for making an order as asked, and that he declined to create such a precedent; and he submitted in his report that the Court had no jurisdiction, as the petitioner herein was the guilty party.

Germaine, K.C., and *G. A. Scott*, for the husband, asked that the report should be varied, and the case remitted to the registrar for inquiry and further report. The registrar relied on *Thompson* v. *Thompson and Barras* (1); but s. 45 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), refers only to an adulterous wife, and does not apply to the case of a guilty husband. But neither that decision nor any practice of the Divorce Court can alter the rights given to any party by Act of Parliament.

[GORELL BARNES J. It is a discretionary section: it does not say "must," but "may," inquire.]

The word "may," with such a context as this, has been defined to mean "must": *Julius* v. *Lord Bishop of Oxford.* (2) There is nothing in the section to limit the application to an innocent party. The husband to-day is only asking that his

(1) (1862) 2 Sw. & Tr. 649. (2) (1880) 5 App. Cas. 214, at p. 241.

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case shall be heard. The registrar has stopped him in limine. The Court has said that the widest scope should be given to the Act: *Blood* v. *Blood*. (1)

Sect. 5 of the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), gives a right to petition and inquiry, whether the party applying be innocent or guilty; and the objection taken by the registrar is, in effect, sterilizing the Act, and reading into it such words as "provided the petitioner be not the guilty party."

Bargrave Deane, K.C., and *Barnard*, for the wife. *Thompson* v. *Thompson and Barras* (2) is the nearest reported case to this. At the time the first Divorce Act was passed, provision was only made for dealing with the separate estate of a guilty wife. That did not go far enough, and another Act (22 & 23 Vict. c. 61) was passed giving the Court power to deal with and vary all marriage settlements. But, on the principle that a guilty party cannot be allowed to take advantage of his own wrongdoing, it is submitted here that there is no power in the Court to entertain or consider this petition at the instance of the guilty party.

[GORELL BARNES J. I feel a difficulty, on the language of the section, in holding that there is absolutely no power. Supposing a wife were the guilty party, she having settled all her property before or during the marriage, and given her husband the first life interest; and supposing she were divorced and had not a penny to live upon, would it not be within the jurisdiction of the Court to make her some allowance? I should prefer to hear the merits of this matter.]

The Court, if it have absolute discretion to inquire into and vary marriage settlements, has always exercised that discretion by saying it will make no order at the instance of a guilty party and at the expense of the innocent one. The Court has ample power, under s. 32 of the Act of 1857, to deal with the supposititious case just stated from the bench. But, even upon the present petition as it stands, there is no ground shewn why the Court should make the order asked for by the husband.

Germaine, K.C., in reply. The wife is getting a benefit by

(1) [1902] P. at p. 82. (2) 2 Sw. & Tr. 649.

the fact of her husband going away, as she has not to contribute towards the expenses of his keep in the household.

In *Hartopp* v. *Hartopp and Akhurst* (1) it was held that the petitioner ought to be placed, as nearly as circumstances would permit, in the same position as she was in before. Such proportion, therefore, of the 2000*l.* a year as can properly be allocated to the expenses incurred by the wife in keeping her husband while they were living together ought to be deducted from the wife's 2000*l.* annuity, and the settlement should be varied accordingly.

GORELL BARNES J. It is not necessary to send this case back to the registrar. Two points have to be considered. The first is whether, under s. 5 of the Act of 1859, the Court has any power to inquire into the existence of marriage settlements and deal with them at the instance of the guilty party. I do not think it necessary to lay down a positive rule as to that. It is extremely difficulty to cover all the cases that might arise and be brought before the Court. This case can be disposed of on the second point, namely, that assuming all the facts alleged in this petition to be accurate, and assuming that I have jurisdiction to entertain this petition, this is not a case in which I ought to make any order varying the settlement. If a husband chooses to break up the joint matrimonial establishment by departing from it, the Court ought not to reduce the wife's allowance on that ground. This petition for variation of the settlement, therefore, will be dismissed with costs.

Solicitors for husband : *Smiles & Co.*
Solicitors for wife : *Batten, Proffitt & Scott.*

(1) [1899] P. 65.

H. D. G.

1902
April 28.

THE ASSUNTA.

Admiralty—Practice — Parties — Action in Rem—Writ — "Co-partners"— "Owners"—Misdescription of Plaintiff—Rules of Supreme Court, 1883, *Order* XLVIII. *A, r.* 1—*Irregularity—Fresh Step—Order* LXX., *rr.* 1, 2.

In an Admiralty action in rem for damage to cargo, the writ was issued in the name of a firm, and indorsed "The plaintiffs, as owners of goods laden on board" the carrying ship, claim compensation. The owners of the carrying ship appeared as defendants, gave bail, and, on their demand for particulars of names and addresses, the plaintiffs gave the name of a single individual residing in Paris, trading under the firm name at a London address. The defendants applied for security for costs, and, on this application being refused, moved to set aside the writ on the ground that under Order XLVIII. A, r. 1, the firm in the name of which the writ is issued must consist of two or more persons:—

Held, by Sir F. H. Jeune P., that, as the indorsement on the writ stated that the plaintiffs sued as "owners" of the cargo, the practice in Admiralty would have been satisfied if the word "owners" had appeared on the face of the writ. The mistake was, therefore, a mere "irregularity" which could be cured by leave to amend under Order LXX., r. 1, and, further, that as the defendants had, by applying for security for costs, taken a fresh step after knowledge of the irregularity, they were precluded by rule 2 of the same order from taking advantage of the irregularity.

The Admiralty practice as to the title in an action in rem for damage to cargo is not abrogated by the rules of procedure under the Judicature Acts.

MOTION by defendants, the owners of the Italian steamship *Assunta*, to set aside an Admiralty writ in rem for damage to cargo, on the ground that the writ was issued in the name of a firm, not consisting of two or more persons, contrary to the provisions of Order XLVIII. A, r. 1 (1), of the Rules of the Supreme Court, 1883.

(1) Rules of Supreme Court, Order XLVIII. A, r. 1: "Any two or more persons claiming . . . . as co-partners, and carrying on business within the jurisdiction, may sue . . . . in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action; and any party to an action may in such case apply by summons to a judge for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, co-partners in any such firm. . . ."

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The facts were shortly as follows :—

On March 21, 1902, a writ of summons in an Admiralty action in rem was issued at the suit of "Louis Dreyfus & Co." against the owners and parties interested in the carrying ship, and the indorsement ran: "The plaintiffs, as owners of goods laden on board the steamship *Assunta* on a voyage from the river Plate to England, claim compensation for damage done to the said goods during such voyage." The writ was served with the warrant the same day and the vessel arrested. On the following day the defendants' solicitor gave an undertaking to appear, and on March 26 an appearance was entered. On April 10 bail was given by the defendants in 800*l.* and the vessel released. On April 15 the plaintiffs, pursuant to the demand of the defendants, furnished the following particulars of the name and address of the plaintiffs: "Leopold Louis Dreyfus, 42, Rue du Louvre, Paris, trading as Louis Dreyfus & Co., 194, Bishopsgate Street Without, E.C." On the same day the defendants took out a summons for security for costs on the ground that the action was brought by a foreigner residing abroad. This summons was dismissed, and the defendants thereupon moved to set aside the writ.

Leck, for the defendants, in support of the motion. The writ was improperly issued in the name of Dreyfus & Co., a firm which the particulars, furnished by the plaintiff, shew does not consist of two or more persons: Order XLIII. A, r. 1. Before the Judicature Acts partners could only sue in their own names, and though the rules now authorize the commencement of a suit in the name of the firm if it consist of two or more members, a person trading by himself as a firm, or in an assumed or trading name, must sue in his own name: *Mason* v. *Mogridge* (1); and, as there is no enactment or rule authorizing the commencement of a suit in the name of a firm consisting of one individual only, the objection is fatal: see judgment of Lord Herschell in *Smurthwaite* v. *Hannay*. (2)

A. E. Nelson, for the plaintiffs, contra. It is submitted that

(1) (1892) 8 Times L. R. 805. (2) [1894] A. C. 494, at p. 501.

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the procedure in Admiralty actions in rem is unaffected by the rules under the Judicature Acts. It has already been held in *The Maréchal Suchet* (1) that the practice in Admiralty as to parties to the suit and joinder of causes of action in proceedings in rem is not affected by the provisions of the rules of the Supreme Court relating to those matters as interpreted by *Smurthwaite* v. *Hannay*. (2) The order now relied upon relates to the mode of suit by co-partners, but owners of cargo are not as such co-partners, and if the word "owners" of cargo had been added to the name of the firm, or if the action had been commenced simply by the "owner of cargo laden on board" the carrying ship, the title of the cause would, according to the old practice in Admiralty (3), have been in order, and as the words "owners of goods" are in the indorsement the omission is not a matter of substance, but, at most, an irregularity which can be cured under Order LXX., r. 1 (4), by leave to amend: see *Dickson* v. *Law & Davidson*. (5) Secondly, being a mere irregularity, the defendants are precluded by rule 2 (6) of the same order from availing themselves of it, as, by applying for security for costs, they have taken a fresh step with knowledge of the irregularity.

[The cases of *The Longford* (7), *The Freedom* (8), *Petty* v.

(1) [1896] P. 233.

(2) [1894] A. C. 494.

(3) "For a period of probably not less than two hundred years, proctors have been permitted to appear on behalf of parties suing without being called upon to exhibit any proxy . . . . (but) . . . . at any period of the cause . . . . the Court has a right to call upon the proctor to state, not generally, but specifically, by name, the whole of the parties for whom he is authorized to appear": per Dr. Lushington in *The Whilelmine*, (1842) 1 Wm. Rob. 335, at p. 337, quoted with approval in *The Euxine*, (1871) L. R. 4 P. C. 8.—Reporter's note.

(4) Rules of Supreme Court, 1883, Order LXX., r. 1: "Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void, unless the Court or judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or judge shall think fit."

(5) [1895] 2 Ch. 62.

(6) Order LXX., r. 2: "No application to set aside any proceeding for irregularity shall be allowed . . . . if the party applying has taken any fresh step after knowledge of the irregularity."

(7) (1889) 14 P. D. 34, per Bowen L.J. at p. 38.

(8) (1871) L. R. 3 A. & E. 495.

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Daniel (1), and *St. Gobain* v. *Hoyermann's Agency* (2) were referred to.]

Leck, in reply. The Admiralty Court only acquired jurisdiction in 1861 (24 Vict. c. 10, s. 6) in respect of damage to cargo imported, and, therefore, no reliance can be placed on any antecedent practice with regard to actions in rem generally. (3)

THE PRESIDENT (SIR F. H. JEUNE). This case has been well argued before me, and turns upon the point that the plaintiffs are really one person, namely, Leopold Louis Dreyfus, residing in Paris, but the suit has been commenced in the name of Louis Dreyfus & Co., that being the firm name under which he carries on trade in the City of London. It is quite clear who the plaintiff is, because the indorsement on the writ states that the plaintiffs claim "as owners of goods laden on board" the carrying ship; but if this writ should be held under the rules to be technically bad, the result would be serious, for this being an action in rem, and bail having been given, the ship has been released, and is now out of the jurisdiction.

The question is, then, whether the title of the plaintiff renders the writ null—that is, whether it is wrong, and if so whether it is more than an irregularity. The rule relied on is Order XLVIII. A, r. 1. [The learned judge read the rule already set out, and continued:—]

Before the date of this rule persons could not sue or be sued in the name of a firm. The names of all the partners had to be added; but this rule gives power to persons carrying on business under a firm name to sue in the firm name, although in point of fact there might be several partners, without stating the names of the partners, except in the limited way required by the latter part of the rule. Now what is said is, first of all,

(1) (1886) 34 Ch. D. 172.

(2) [1893] 2 Q. B. 96.

(3) The arguments by counsel for the defendants as to the address having been omitted on the copy writ served on the defendants' solicitor, and that the address given was wrong, are omitted, as these points were not pressed.

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that this rule does not apply to an action in rem at all, and I must say I think there is a great deal of force in that observation; I am not sure, however, that it is necessary for me to-day to decide that question. There is undoubtedly an old practice in the Admiralty Court of great value which enables the owners of a ship or cargo in any Admiralty action to sue as such—a proceeding which would have been regarded by the Courts of Common Law with professional horror; but the Court of Admiralty allowed it for a very good reason, because what they were really dealing with was one ship against another, and so long as you had the names of the vessels you had really all that was material. You could ascertain the names of the owners from the register, or otherwise.

The result is that we have an antecedent practice of a very peculiar kind in the Admiralty Court, and I do not think it is too much to say that it is improbable that this rule, in its general terms, was intended to abrogate so old and valuable a practice as that which obtained in the Admiralty Court; and, indeed, on looking at the terms of the rule it will be found not to apply to the case of owners of ships, because it speaks only of persons suing and being sued in the name of their respective firms, whereas the owners of a ship do not as such constitute a firm. Therefore I feel no difficulty in saying that this rule does not apply to abrogate the former practice of the Admiralty Court, of allowing the owners of a ship to sue as such; but that does not carry the case the whole way, because this is not a case of the owners of a ship suing. Mr. Dreyfus did not in this case sue "as owner." He sued as Louis Dreyfus & Co., and I am not prepared to say that in its true sense this rule does not apply to Admiralty as well as to any other Division of the High Court, so that if the question were whether in the Admiralty Court a person can sue in a firm name, I am not prepared to hold that he can; but a further question arises which, to my mind, is of importance. I have to decide, not only whether this is a mistake in this case, but whether it is an irregularity which can be cured. I am told that it is more than an irregularity, because previously a

partnership could not sue at all—it could only sue in the names of the real partners—and therefore, it is said, the terms of this order must be strictly complied with, or else the whole proceeding is a nullity. The case of *Smurthwaite* v. *Hannay* (1) is relied on. If these were proceedings at common law, that might be the case; but what I think is this, that in the Admiralty Court, having regard to the previous practice, which I do not think has been abrogated, and having regard to the form of the indorsement on this writ, there is a mere irregularity. What are the facts? Here is a person suing in the name of the firm, and the writ states on the back how he does sue. If he had sued as "owners" I think it would have been perfectly good. Therefore all it comes to is this—that instead of putting on the face of this writ "Louis Dreyfus & Co., as owners," or "Louis Dreyfus, as owner," of the goods, he has put Louis Dreyfus & Co. on the face of the writ, and he has stated clearly on the back that the plaintiffs are suing as owners. I cannot regard that as more than a mere irregularity.

This is a different case from that of *Smurthwaite* v. *Hannay*. (1) There persons were suing together who could not so sue. There was a very material matter involved, and there was much more than a mere irregularity; but having regard to the Admiralty practice in this Court, which, I think, is not abrogated, and having regard to the indorsement on the writ, I am of opinion that in the Admiralty Court, where the only mistake made is that of not putting on the face of the writ what has been put on the back, and what if put on the face of the writ would have made it good, there is a mere irregularity. I therefore think under the circumstances that the mistake made is a mere irregularity, and that Order LXX., r. 1, applies, and an amendment may be allowed. It follows from this, that Order LXX., r. 2, applies also, for the defendants have taken a step, namely, asking for security for costs, after they knew the facts of the real composition of the firm of Louis Dreyfus & Co. and of their ownership of the goods. That

(1) [1894] A. C. 494.

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enables me to say that I think in this case all that has happened is mere irregularity, which can be cured by an amendment, and that I am prepared to allow. I do not think it necessary to deal with the other matter, as to the address of the plaintiff, because to call that even an irregularity seems to me to be using too high a term. The original writ was all right in that respect, but the copy of the writ was wrong.

Defendants' motion dismissed without costs. Plaintiffs to have leave to amend. Leave to defendants to appeal.

Solicitors for plaintiff: *Lowless & Co.*
Solicitor for defendants: *Greening.*

T. L. M.

[DIVISIONAL COURT.]

1902
May 6, 8.

THE MARGERY.

Admiralty—Salvage—Associated Insurance Clubs—Agreement by Owners to render Mutual Assistance—Arbitration—Notice to Masters—Rights of Crew.

An agreement between the associations in which fishing vessels are insured, that the amount of remuneration payable for salvage services rendered by one of the insured vessels to another shall be settled by the committees of the two associations concerned, is not binding on the master and crew of the salving vessel, who are not parties, and have not assented, thereto:—

Quære, whether such an agreement would not, in respect of the members of the crew, even if assented to by them, be against public policy.

APPEAL by defendant, the owner of the steam drifter *Margery*, against a decision of the judge of the Yarmouth County Court, awarding salvage to the master and crew of the steam drifter *Fifteen* for services rendered to the *Margery*.

The case raised the question whether the master and crew of the salving vessel were bound to accept the amount awarded by arbitrators appointed by the clubs in which the salving and salved vessels were insured.

The facts were shortly as follows:—

On October 9, 1901, about 9 A.M., the wind being strong from the N.W. with heavy sea, the *Margery*—a ketch-rigged wooden screw steam drifter of thirty-one tons register, carrying a crew of ten hands all told, and valued at 2000*l.*, with nets and gear 300*l.*, and fish 1*l.* 10*s.*, total 2301*l.* 10*s.*—was herring fishing off the East Coast, about thirty-six miles from Yarmouth, and, having hauled in her nets, was preparing to return, when those in charge found that her rudder was gone. The master hoisted the flag of the club in which his vessel was insured, put up two balls to shew that she was disabled, and, working her with her sails and propeller, brought the vessel, by 3 P.M., within about fourteen miles of Yarmouth. Here the *Fifteen*—a wooden screw steam drifter of 25·76 tons

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register, manned by a crew of ten hands all told, and valued at 3200*l.*—which had also been engaged in herring fishing, and was returning to Yarmouth, came up with the *Margery*, and agreed to give her a rope. This, however, shortly afterwards parted, and fouled the propeller of the *Margery*. A wire rope was then passed to the *Fifteen* from the *Margery*, and, in about two hours, the *Margery* was safely towed by the *Fifteen* into Yarmouth.

At the time of the rendering of these services, the *Fifteen* was insured in the Total Loss Mutual Steamship Insurance Company of Sunderland, the policy containing a clause that "it is mutually agreed between the assured and assurers that the articles of association of the assurers' company shall be deemed part hereof, and be binding upon the assured and assurers as fully and effectually, to all intents and purposes as if such articles were inserted in this policy, and any breach thereof will invalidate the same." By clause 92 of the articles of the association, "Steamers insured in this association bind themselves to give assistance to any vessel broken down or in distress, insured in this association, or in the associations of the United Kingdom Steam Tug and Trawler Insurance and Indemnity Association of North Shields" (then followed the names of other associations), "it having been arranged that the vessels in these associations shall be bound to like conditions, and that the compensation for services rendered be decided and determined by the committees of the association or associations in which the vessels were insured."

The agreement signed by the crew of the *Fifteen* contained the following clause: "Every member of the crew, including apprentices and sea-fishing boys, shall be regarded as entitled to participate in any sum or sums of money arising from any salvage or salvage services performed for any ship in distress or otherwise, in the proportion set forth opposite to their respective names in this agreement." Opposite their respective names appeared the proportions in which they were to take by way of wages seven out of sixteen shares of the profits, and in the next column, under the heading "Salvage," was written "half and half."

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On board the *Fifteen* was a card headed "The Total Loss Mutual Steamship Insurance Company, Sunderland," with coloured illustrations of the flags of the various associations attached. It ran: "Notice to Masters.—The above association is amalgamated with the under-mentioned associations and companies for the settlement of towage cases: United Kingdom Steam Tug and Trawler Insurance and Indemnity Association of North Shields" (then followed the names of other associations). "All masters of vessels insured in the Total Loss Insurance Company, Sunderland, are bound to render and accept assistance when necessary to and from any vessel insured in the above associations and companies."

The *Margery* was, at the time in question, insured in the United Kingdom Steam Tug and Trawler Insurance and Indemnity Association of North Shields, and a clause in the policy embodied a similar article of the association, as to mutual assistance, to that set out above in the case of the *Fifteen*, and amongst the enumerated associations was that of the Total Loss Mutual Steamship Association of Sunderland.

In accordance with the rules of the two clubs in which the vessels were respectively insured, a committee, consisting of three directors of the United Kingdom Association, and one director of the Sunderland Association, met on December 16, and, after reading the statements of the two masters, an award of 25*l.* was made. A cheque for this amount was forwarded by the owner of the *Margery* to the owners of the *Fifteen* and accepted by them. Half this amount (12*l.* 10*s.*) was tendered by the owners of the *Fifteen* to the master and crew of that vessel, but was refused by them.

On January 6, 1902, an action for salvage was instituted in the Yarmouth County Court by the master and the nine members of the crew of the *Fifteen* against the *Margery*, her nets and fishing gear, in the sum of 150*l.* At the trial it was admitted by the master and crew of the *Fifteen* that they knew of the arrangement as to mutual assistance, and that they acted upon it when they saw the club flag of the *Margery*, but they denied that they knew of, or had ever agreed to, the mode of settlement adopted by the two clubs.

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The learned county court judge held that there was no authority to bind the master and crew by the arbitration proceedings, and having, with the assistance of nautical assessors, heard the case on its merits, he awarded the master and crew of the *Fifteen* by way of salvage remuneration the sum of 60*l.*, as being a moiety of the total salvage award he would have made if the owners of the *Fifteen* had been parties to the suit.

May 6. *Scrutton, K.C.*, and *Roche*, for the appellant (defendant). The award of salvage in the Court below was wrong, for a settlement of the amount of salvage had been arrived at in a manner agreed upon by the parties, and a tender of their share had been made to the plaintiffs. The effect of the clause in the policies of insurance of the various clubs incorporating the articles of association is to compel the owners of the vessels insured in the several associated clubs to submit questions of salvage services, rendered by their vessels to other vessels in the clubs, to arbitration, and thereby avoid litigation and consequent expense. The owners, therefore, are bound by the arrangement, and in this particular case the committees of the two associations concerned met, and, after considering the written statements of the masters of the salving and salved vessels, they awarded the sum of 25*l.* to the *Fifteen* to be paid by the owner of the *Margery*. By the "Notice to Masters" exhibited on board all the vessels of the associated clubs the masters and crews were informed of the arrangement, and by the agreements signed by the crews the division of the salvage award was to be in the proportion of "half and half." It is not disputed by the master and crew of the *Fifteen* that they knew of and acted upon the arrangement, and, on the *Margery* hoisting her club flag, the *Fifteen* took her in tow. Their assent to the settlement of the amount of award would, therefore, be implied. Kennedy J., in his work on Salvage, at p. 224, says: "the master of the salving ship, acting fairly, can bind his officers and men by an agreement fixing the amount of reward for salvage services to be rendered by ship and crew as a whole, if it is made before the services are rendered . . . . and the owner of the salving ship, in this

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matter of competency to act for the crew, would stand, it is presumed, in no different position from that of the master." In *The Nasmyth* (1) an action of salvage by thirteen of the officers and crew of the salving ship, who were dissatisfied with an agreement made by their master with the master of the salved vessel before the services were rendered, was dismissed with costs by Butt J. on the ground that the agreement was a fair one, made in a bonâ fide manner, and one by which the master of the salving vessel had authority to bind his owners and crew. The learned judge further said that it was "against public policy and much to be deprecated that seamen should endeavour to upset such an agreement."

May 8. *Lauriston Batten*, for the respondents (plaintiffs). The master and crew of the *Fifteen* were not bound by the settlement arrived at with the owners of that vessel. The right to salvage is not dependent on contract, express or implied. It is a right given in the interests of commerce to those who voluntarily undertake a risk to save property, and, though an agreement may be made, it will be scrutinized by the Court to see whether it was in fact entered into, and if so, whether it is for the public interest that it should be enforced. In the present case the amount awarded in the salvage action was nearly five times the sum tendered to the master and crew of the *Fifteen*. This is sufficient to shew the gross inadequacy of the sum fixed at the meeting of the committees of the two associations; for the Court below was assisted by nautical assessors, and the view taken by them was very much to enhance the value of the services rendered by the master and crew of the *Fifteen*, and will suffice to enable this Court, in the interests of public policy, to overrule the agreement by upholding the decision of the Court below. Apart, however, from the question of inadequacy, and apart from the question whether such an agreement as that alleged to have been entered into by the crew is not forbidden by the terms of the Merchant Shipping Act, 1894, in that the effect would be to abandon the lien and oust the jurisdiction of the Court, it is submitted that the appellant has failed to prove any express or implied

(1) (1885) 10 P. D. 41.

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agreement under which the master and crew of the *Fifteen* were bound to abide by the award of the two committees.

Assuming that these clubs are mutual protecting and indemnity as well as insurance associations, and that an agreement was entered into with the underwriters by the owner with reference to the mode in which a salvage award was to be ascertained, the crew are no parties to that contract, and there is no evidence of a contract between the master and crew of the *Fifteen* and the owners of the salved vessel.

All that the articles which have been put in shew is that the shares of salvage, as between the owner on the one hand and the master and crew on the other, are to be "half and half" of whatever the salvage may amount to. The "Notice to Masters," which has been relied on, only deals with towage, and does no more than tell the master and crew that they are to assist other club vessels, but no mention is made of the terms on which the assistance is to be rendered. In *The Britain* (1) it was held that, though the master of the salving vessel may bind his own interest and the interest of his employers by an agreement with the owner of the salved vessel, such an agreement will not be conclusive upon the rest of the crew if made without their sanction and concurrence. In *The Sarah Jane* (2) it was held that owners of vessels which have received salvage assistance cannot safely enter into a settlement of a salvage compensation, which includes the interests of all persons concerned in the salvage, without procuring a general release in the first instance; and Dr. Lushington, after referring to his decision in *The Britain* (1), said: "in all ordinary cases of salvage, neither the owners nor the master have a power of binding the crew without their previous consent." In *The City of Calcutta* (3) it was doubted whether a master has authority even to bind his owners to submit to arbitration as to the amount of the salvage remuneration.

[He was stopped by the Court.]

Roche, in reply. It is not disputed that there is power to overrule an agreement, if the Court, under the circumstances,

(1) (1839) 1 Wm. Rob. 40. (2) (1843) 2 Wm. Rob. 110, at p. 116.
(3) (1898) 8 Asp. M. L. C. 442.

deems it, by reason of inadequacy, inequitable: *The Phantom* (1); but it is submitted that 25*l.* was a fair and reasonable reward in respect of the services rendered, and that the plaintiffs are bound by it. In *The Enchantress* (2), decided by Dr. Lushington after the passing of s. 182 of the Merchant Shipping Act, 1854, by which stipulations by seamen as to abandoning salvage rights were rendered inoperative, it was held that agreements limiting the proportion of salvage money are to be maintained if really equitable: see also *The Ganges*. (3) In both *The Britain* (4) and *The Sarah Jane* (5), cited on behalf of the respondents, the agreements which were unsuccessfully set up against the claims of dissatisfied members of the crews of the salving vessels were made after the services had been rendered—that is, after a right to salvage remuneration had already arisen; but in the present case the agreement to refer to arbitration was made before the salvage services were rendered. This distinction between an agreement as to future and as to past services was taken in *The Inchmaree* (6), and in that case the amount fixed by the agreement in respect of the future services was upheld.

THE PRESIDENT (SIR F. H. JEUNE). I think this case can be decided substantially on the ground upon which it has been decided in the Court below—that is, a ground which really depends, in the last resort, on a question of fact.

The action is brought by the master and crew of the *Fifteen* against the owner of the steam drifter *Margery*. It is not an action by the owners of the *Fifteen*, but only by the master and crew; and the circumstances in which it was brought were that the owners of these two fishing vessels appear to belong to institutions known as clubs, and the result of that is that those vessels are bound, according to the rules of those clubs, to render each other assistance on the terms that the price to be paid for such assistance shall be determined by a particular

(1) (1866) L. R. 1 A. & E. 58, per Dr. Lushington at p. 61.
(2) (1860) Lush. 93, at p. 96.
(3) (1869) L. R. 2 A. & E. 370.
(4) 1 Wm. Rob. 40.
(5) 2 Wm. Rob. 110.
(6) [1899] P. 111.

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kind of arbitration, and for the moment I will assume that the owners of the vessels, and their vessels in that sense, are bound by that agreement.

The question is whether the master and crew are bound; and in this case, after an arbitration had taken place as to the amount to be paid, the master and crew say they are not bound by that arbitration, and they ask to have the amount of their services determined in value by the Court. The learned judge in the Court below has agreed in the views they put forward. He has found, as we gather from his remarks, that they are not bound by the arbitration. I do not think he meant, or that it is suggested he meant, that they were not bound by the arbitration because the arbitration is invalid, but that they were not bound by the arbitration because they were not bound by any agreement. That is the point upon which I think the case turns.

I should be prepared to admit that the owners may be bound, when a question arises as to salvage, to go to arbitration in the way mentioned, and have the amount determined; but in this case the very simple question is: Are the master and crew, who have independent rights in the matter, bound by that agreement? That, as I said, depends upon a question of fact, which it appears to me we have to determine. Now the master and crew are bound, as between themselves and their owners, to a certain extent, because they entered, under their articles, into an agreement that they, putting it shortly, should have half of whatever salvage amount should be taken. The words are very clear about that. To that extent, between themselves and their owners, they are bound; but there the matter appears to me to stop. We are asked to go very much further, and asked to say that not only are they bound as between themselves and their owners, but that as between themselves and the owners of any other ship which they may salve they are bound by an agreement made by their owners to allow the matter to go to arbitration and to take the money which the arbitrators give. That cannot be made out on any express agreement. There is none. There is no language to that effect in their articles, and no language to that effect any-

where; but it is said there is a certain notice exhibited on the ships, of which we have a copy, and which is in some way said to bind the master and crew. I am not at all prepared to say that under certain circumstances an agreement made by the owners on behalf of the crew might not bind them, just as an agreement made under certain circumstances by the master may bind the owners. It is clear that if, before the salvage service is rendered, the masters of the two ships meet together, they may make an arrangement by which, subject to the jurisdiction of this Court to see whether it is equitable or not, the masters can undoubtedly bind the owners. I should not be prepared to deny that an agreement made under similar circumstances by the owners on behalf of the master and crew might bind the master and crew; but the reason for that is the necessity of the case. The service has to be rendered on the spur of the moment, and if the agreement cannot be made by the only persons who are there to make it, it cannot be made at all. Therefore ex necessitate an agreement so made binds; but that is a very different thing from saying that, when there is no stress at all, an arrangement made by the owners binds the master and crew, without any notice to the master and crew. That proposition I am not prepared to adopt, nor is that seriously contended. What is said is that the master had notice of these terms, and had acquiesced in them. That appears to me to be a question of fact upon which the matter turns, and I am not prepared to say that there was any such acquiescence by the master of the ship which binds him, much less his crew, to the settlement of this case by arbitration in the way the owners may, perhaps, have agreed.

It is quite clear that in fact the master and crew knew nothing of the terms. We have the evidence of the master himself to the effect that he had never heard of any such agreement, and I do not think it can be disputed that, as to going to arbitration, that is a matter about which this particular master and this particular crew were wholly ignorant; but it is said, in spite of that, there was this card exhibited, and that in some way bound them. What is this card? No doubt it is called a "Notice to Masters," and it states that

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"the above association is amalgamated with the under-mentioned associations and companies for the settlement of towage cases." Then it goes on to say that "all masters of vessels insured in the Total Loss Insurance Company, Sunderland, are bound to render and accept assistance when necessary to and from any vessel insured in the above associations and companies." I agree in what one of the learned counsel said, that it is possible that to an astute person it may convey the impression that disputes are to be determined by arbitration in a particular way, but further than that it does not seem to me to go. It does not say what the terms are. The very fact that it uses the word "towage," and not "salvage," appears to me to make it clear that it does not intend to give particulars of the agreement between the owners, and, as my learned brother has pointed out, there are cases of salvage in which the question of towage would not enter. Therefore, when we find the notice limited to the "settlement of towage cases," I think one is entitled to say that it hardly even gives notice that there may be an arrangement for the peculiar settlement of salvage cases. Then, it goes on to say that they are bound to render assistance. That may be, but it does not say that they are bound to enter into the service upon these particular terms as regards themselves. Therefore, assuming they had this card before them, it appears to me it falls very short indeed of giving them such notice of the arrangement as would cause them to be bound by acquiescence. Indeed, the highest that acquiescence can be put is that they went to sea and continued their fishing operations, and salving operations, with this in their minds. This appears to me wholly insufficient to fix them with acquiescence in a contract of which they knew nothing. Upon this ground, therefore, I am prepared to decide the case.

I am conscious that this decision leaves open many questions, some of them of very great interest; for instance, how far this Court would review the decision arrived at by arbitrators of this kind, apart from any question of the validity of the arbitration by reason of incapacity on the part of the arbitrators. I am not prepared to say, at present, that this Court

has any such power. Whether the power of the Court can be extended to deal with arbitration made in pursuance of an agreement to arbitrate by persons supposed to be sui juris, having knowledge of the circumstances—whether in its application to a particular case the arbitration of such a tribunal would come under the general jurisdiction of this Court, I, at the present moment, must decline to say.

There is a further question in this case, namely, whether this particular arbitration is assailable on the ground that the arbitrators were not sufficiently independent. I entirely decline to express any opinion. It is not an easy question to decide, and it is one which I am glad to be able to avoid. Some day it may have to be argued whether, even as between owners, the agreement sufficiently avoids difficulties with regard to public policy; and there may also be a question, as regards seamen, whether it is not in contravention of the provisions of the Merchant Shipping Act. It is not necessary in this case to go into those questions, and I base my decision upon the ground that as between the master and crew of this vessel and the owners of the vessel salved it is not shewn that there is any agreement which ousts the jurisdiction of this Court. My learned brother reminds me that something ought to be said about the figure at which the Court below arrived. I think that stands upon very strong ground. The matter was considered by the judge below, with nautical assessors, and the Court arrived at a figure considerably in excess of the amount awarded by the arbitrators, but which, upon the facts of the case, does not appear to be at all in excess of what a reasonable tribunal might arrive at, so that I am not prepared to differ from it.

GORELL BARNES J. The learned President has dealt so fully with the case that I might content myself with saying that I agree; but, having regard to the importance of the matter, I desire to add a few words.

The plaintiffs' claim is that of the master and nine of the crew of the steam drifter *Fifteen*, for salvage in respect of services rendered to the drifter *Margery* off Yarmouth. It is

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sought to meet the claim by saying, on the part of the defendant, that the plaintiffs cannot recover on the basis of an ordinary assessment of salvage in this Court, or the Court below, but are bound by a decision of certain arbitrators, fixing an amount which would give to the present plaintiffs a sum of 12*l.* 10*s.*

Now, it seems to me that in order to make out this defence the defendant has to prove that the plaintiffs have agreed to submit their claims to the decision of the arbitrators who made the award. It is sought to do that in a very roundabout way. No direct agreement, no express agreement, between the salvors who are suing and the owner or master of the salved vessel is proved, or sought to be proved; but it is said that the *Fifteen* was insured in a mutual insurance club; that the terms of that insurance incorporated the rules of that club, which provided that steamers insured in it bound themselves to give assistance to any vessel broken down or in distress insured in that association or certain other associations; that it had been arranged that the vessels in those other associations should be bound by like conditions, and that the question of remuneration for services rendered should be determined by the committees of the associations. It is also said that the defendant ship was insured in another association, and that the policy by which she was insured in that other association incorporated the rules of that association—which had rules substantially to the same effect. Then, having both ships insured in that way, the secretary of one of the clubs was called as a witness to say that there is a mutual arrangement between the clubs for the purpose of assessing salvage claims. So far there has been, in a roundabout way, an arrangement suggested between the owners of the ships; not a word about the master and crew.

It is then said that the master and crew are fixed by this arrangement, and have become parties to it, because a notice was exhibited on board each ship. A copy of it has been furnished to the Court. There the evidence really stops, because, though it is sought to say that the master and crew in some way assented to that state of things, so far as the evidence goes, the master says although he knew of this notice

he knew nothing whatever about the provision to go to arbitration, and that he never had been told anything about it and never agreed to it. The other evidence is substantially to the same effect: for instance, the engineer is called and says "that has nothing to do with the crew."

I think it is quite clear that the master and crew never, in fact, thought that they were bound, as salvors, by what it is suggested was an intimation to them that they were so bound; so that the suggested contract put forward by the defendant seems to me entirely to fail of proof, because he does not prove that the parties suing ever agreed in any way to be bound. I think there would be great difficulty in this case in establishing such a matter even with stronger evidence than is put forward, for the reason that the master and crew are employed by their owners on the basis of certain articles. Those are the terms of their employment, and amongst them there is a stipulation that as between owners and master and crew any salvage shall be divided in halves. That enables the crew to say, "When you have got anything you must give us half of it"; but, then, how are they bound in any way afterwards to render salvage services at all? There appears to me to be nothing to shew that they are. This card only shews that the association is amalgamated with other associations for the purpose of towage services, and it states that all masters are bound to render and accept assistance when necessary to and from other vessels insured in the associations; but how bound? They never agreed to be bound. They are on the ship, and the only contract they have made is to be employed by their owners upon the basis of the articles. They never agreed to be bound to render or accept assistance, and unless a great deal more is proved it seems to me they remain free agents to render services upon such terms as are usual.

I think, therefore, that this case may be disposed of on those grounds as a pure question of fact, and I do not desire to enter into what seems to me a very difficult question, namely, what would be the position if it could be proved that the master and crew had agreed to go to arbitration. Then, there would still be raised the question whether this Court would

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have power to review any decision which might not meet, from any cause, the justice of the case. I do not wish to throw out any words now which should in any way lessen the jurisdiction of the Court. There are other questions as to how far the provisions of the Merchant Shipping Act affect the case, and I do not wish to express an opinion on such a matter, which would require very careful consideration.

Upon the merits it seems to me that we ought not to interfere with the judgment of the Court below, as upon the facts there is nothing to shew me that it has arrived at an erroneous conclusion.

Appeal dismissed with costs.

Solicitors for appellant (defendant): *Williamson, Hill & Co., for R. & R. F. Kidd, North Shields.*

Solicitors for respondents (plaintiffs): *Dubois & Williams, for H. Chamberlin, Great Yarmouth.*

T. L. M.

C. A.

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April 30.

[IN THE COURT OF APPEAL.]

BLACKETT *v.* BLACKETT AND FRAIL.

Practice—Divorce—Bankrupt Petitioner—Claim for Damages—Security for Costs.

There is no settled practice in the Probate and Divorce Division that a petitioner, who is an undischarged bankrupt and who claims damages from the co-respondent, must give security for costs unless he withdraws the claim for damages.

APPEAL from an order of the President (Sir F. Jeune).

On October 8, 1901, Arthur Henry Blackett, an undischarged bankrupt, presented a petition for dissolution of marriage on the ground that his wife had committed adultery with John Ernest Frail, and he claimed 1000*l.* damages from Frail. The respondent and co-respondent filed answers denying the charges, and the petitioner delivered a reply.

The co-respondent took out a summons asking that the

petitioner should be ordered to give security for costs; and on February 25, 1902, the registrar made an order that the petitioner should within fourteen days give 50*l.* as security for co-respondent's costs unless the claim for damages were withdrawn; the proceedings to be stayed unless such security were given or the claim withdrawn.

The petitioner appealed from this order, and the case came before Sir F. Jeune P. in chambers and was adjourned into Court, and on March 17 his Lordship rescinded the registrar's order.

The co-respondent appealed.

Inderwick, K.C., and *J. Harvey Murphy*, for the appellant. The President seems to have thought that he was bound by the authorities to refuse to order the petitioner to give security for costs. This was a mistake; the learned judge had a discretion, and ought in the circumstances to have made the order. The practice as to costs was, by s. 51 of the Matrimonial Causes Act, 1857, placed under the control of the judge. That section was repealed by the Statute Law Revision Act, 1892; but by the Judicature Act, 1875, s. 18, the rules of the Probate and Divorce Courts are to remain in force until altered, and the President is to have the power of making rules. No alteration has been made; therefore he has a discretionary power over the costs of any proceedings under the Act of 1857. There is a well-established rule in the Probate and Divorce Division that a bankrupt petitioner who claims damages must give security for costs. *Smith* v. *Smith and Palk* (1) settled the point, and has been followed ever since. The cases which the President relied upon were decisions upon the practice in the High Court, and do not apply to this case. But even under them the order should have been made. In *Cowell* v. *Taylor* (2), *Rhodes* v. *Dawson* (3), and *Cook* v. *Whellock* (4), it is pointed out that a mere nominal plaintiff will be ordered to give security for costs, although poverty alone is not a ground for making the order. A petitioner who claims damages is within that rule. He is

(1) (1882) 7 P. D. 227.
(2) (1885) 31 Ch. D. 34, 38.
(3) (1886) 16 Q. B. D. 548, 554.
(4) (1890) 24 Q. B. D. 658, 661.

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not suing for himself. Under s. 33 of the Matrimonial Causes Act, 1857, petitions are to be tried under the same or the like rules and regulations as actions for criminal conversation are "now" tried and decided in Courts of Common Law. The point to consider, therefore, was not what was the effect of recent decisions, but what was the state of the law in 1857. Under s. 33, which allowed claims for damages, the damages, if recovered, were to be paid as the Court should direct, and the whole might be settled on the wife and children. Therefore, in this case, the husband was not suing for his own benefit: *Bernstein* v. *Bernstein*. (1)

Bargrave Deane, *K.C.*, and *Barnard*, for the petitioner. The only authority which supports the contention of the appellants is *Smith* v. *Smith and Palk* (2), but no argument or judgment is reported in that case, and the decision was wrong. Security for costs is never ordered against a man who brings an action in respect of personal injuries. There is no general rule in the Probate Division of the kind suggested; the practice on this point is the same as in other Divisions of the High Court, except with respect to the wife's costs. Under s. 53 of the Act of 1857 the judge may make rules and alter them, and rule 158 of the Divorce Court Rules, 1865, was made for that purpose. The fact that the petitioner claims damages cannot make any difference. Unless he is making the claim on behalf of somebody else, he will not be ordered to give security on the ground of poverty. In actions of crim. con. security was never ordered on that ground; and under s. 33 of the Act of 1857 the common law rule on the subject prevailed: *Rhodes* v. *Dawson*. (3) It has always been the rule that a man who sues for a divorce will not be ordered to give security on the ground that he is a bankrupt, and there is no rule that the order will be made if he also claims damages. Further, the appellant has, by obtaining leave to amend his answer, waived his right to take this objection.

Inderwick, *K.C.*, replied.

(1) [1893] P. 292, 318. (2) 7 P. D. 227.
(3) 16 Q. B. D. 548, 552.

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COLLINS M.R. This is an appeal from a decision of the President by which he overruled the decision of the learned registrar, and allowed the petitioner in divorce proceedings, who was an undischarged bankrupt, to prosecute his suit without giving security for costs. The petitioner is an undischarged bankrupt, and he claims damages against the co-respondent. He avers adultery and claims damages, and the registrar at the instance of the co-respondent ordered him to give security unless he would give up his claim for damages. That was taken on appeal to the President, and he has come to the conclusion, having regard to the decisions in the Court of Appeal, that there was no ground for exacting security for costs under the circumstances of the case. The question is whether he was right.

The first point made by Mr. Inderwick was this: that there is a well-settled practice in the Probate Division to the contrary, and that there was a decision of Sir James Hannen P., pronounced in 1882, on the point which has regulated the practice ever since. I am not sure that that would be sufficient to establish the existence of a well settled practice which we were not at liberty to interfere with if we thought it was not well founded, because the cases are rare in which the two things occur—namely, that the petitioner is an undischarged bankrupt, and that he sues for damages. The learned registrar says it is very rare; so it is not a matter which happens every day, and is dealt with according to one uniform practice: it is a case of an exceptional and sporadic type. Therefore we are justified in looking into the question, and seeing whether the practice is as stated. The President thinks there is no such practice, and the learned counsel who have argued the appeal do not agree about it. So it is not clear that there is such a practice, and we are at liberty to look into it and see if it rests on good authority. I come first to the decision which is the foundation of the whole thing, the case of *Smith* v. *Smith and Palk*. (1) That case is reported so meagrely that the name of the judge is not given, and the judgment is only that "the Court granted the application

(1) 7 P. D. 227.

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unless the petitioner within a week withdrew the claim for damages." So far as the judgment rests on any statement of law, it rests on Mr. Searle's argument, which is contained in four lines. The report states his argument as follows: "He applied for security for costs and a stay of proceedings until the security had been given. The proceedings, so far as damages are claimed, are in the nature of an action for crim. con., to which the practice at common law is applicable." That is the whole argument, and by the judgment, according to the report, the Court granted the application; so I must assume that it was for the reasons given by Mr. Searle, and that in that way was introduced by the authority of Mr. Searle the practice of the common law. Now, the practice at common law was certainly not to order security for costs simply on the ground that the suitor was a poor man. That is absolutely contrary to the common law except in certain exceptional cases, which are referred to and pointed out in the authorities. *Smith* v. *Smith and Palk* (1) is the case which is the foundation of the alleged practice. The foundation is itself infirm, and the practice is not solid enough to justify us in building upon it.

To come to the later authorities. In *Cowell* v. *Taylor* (2) the head-note is this: "The Court will not require security for costs to be given by a plaintiff who sues as trustee in bankruptcy even where he is in insolvent circumstances." Bowen L.J. (3) cites a passage from a judgment of Bovill C.J., which he adopts, as follows: "To entitle a defendant to security he must shew, not only that the plaintiff is insolvent, but also that he is suing as a nominal plaintiff, in the sense of another person being beneficially interested in the result of the action. In that case the Court would stay the proceedings until security is given. That doctrine, however, has never been applied to the case of an executor or the assignee of a bankrupt." In *Rhodes* v. *Dawson* (4) the second paragraph of the head-note is this: "A receiving order made under the Bankruptcy Act, 1883, does not divest the debtor of his property; and what he

(1) 7 P. D. 227.
(2) 31 Ch. D. 34.
(3) 31 Ch. D. 39.
(4) 16 Q. B. D. 548.

recovers as plaintiff in an action is his property both legally and equitably, although he must, when he recovers it, hand it over to the official receiver for the benefit of his creditors if he does not pay or compound with them. Therefore a debtor against whom a receiving order has been made, ought not merely on that ground to be ordered to give security for the costs of any action in which he may be the plaintiff." I emphasize that because I propose to refer to it in connection with one of the arguments used by the appellant. In that case Lindley L.J. says (1): "The law upon this subject is well summed up in the last edition of Chitty's Archbold, vol. i. pt. 5, ch. 33, p. 398: 'The plaintiff will not be compelled to give security for costs merely because he is a pauper or bankrupt or insolvent, and this even in a qui tam action. And this rule applies where the plaintiff is trustee of a bankrupt and is suing for the benefit of the estate; or where the plaintiff is suing as executor for the benefit of the testator's estate.'" There are other passages on the subject in the cases which have been cited, but they do not add anything of importance. Mr. Inderwick argued that there were special circumstances in this case arising under s. 33 of the Matrimonial Causes Act, 1857, which directs that "such petition shall be heard and tried on the same principles, in the same manner and subject to the same or the like rules and regulations as actions for criminal conversation are now tried and decided in Courts of Common Law," "and after the verdict has been given the Court shall have power to direct in what manner such damages shall be paid or applied, and to direct that the whole or any part thereof shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife." He relied on this, that by virtue of this section a bankrupt petitioner is not suing for himself; he is only a conduit-pipe, and the Court allows him to acquire money which it may afterwards give to somebody else; and that therefore he comes within one of the exceptions mentioned in the authorities, namely, the case where a person has been chosen as a man of straw to bring an action on behalf of

(1) 16 Q. B. D. 553.

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another. That argument is met and concluded by the passage I have read from *Rhodes* v. *Dawson* (1); for there it was held that a receiving order had not the effect of divesting the debtor of his property, although, if he recovered it, he was bound to hand it over to his trustee. Therefore, if we are at liberty to follow the rule of common law, the practice is not to make a man in this position give security for costs. I find that the standard to be applied is the standard of common law, and I am justified in saying that there is no settled practice to the contrary in the Probate and Divorce Division, and that according to the practice at common law there can be no doubt that the judgment appealed from was right. The appeal must be dismissed.

STIRLING L.J. I am of the same opinion for the same reasons.

COZENS-HARDY L.J. I agree.

Appeal dismissed.

Solicitors: *Woodcock, Ryland & Parker, for H. C. Clarke, Shrewsbury; Collyer-Bristow, Hill, Curtis & Dods.*

(1) 16 Q. B. D. 548.

H. C. R.

[IN THE COURT OF APPEAL.]

C. A.
1902
May 5, 6.

CRICKITT *v.* CRICKITT (CRICKITT INTERVENING).

Probate—Practice—Intervener—Probate Action—Married Woman—"Proceeding instituted"—Independent Interest—Separate Estate—Restraint on Anticipation—Costs of opposite Party—Form of Order—Rules of Supreme Court, 1883, *Order* XII., *r.* 23—*Probate Court Rules*, 1862 (*Contentious Business*), *r.* 6—*Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *s.* 2.

A summons by a married woman under Rules of Supreme Court, 1883, Order XII, r. 23, and Probate Court Rules, 1862, r. 6, for leave to intervene in a pending probate action for the purpose of asserting her independent interest in the subject-matter, is a "proceeding instituted" by her within s. 2 of the Married Women's Property Act, 1893, and therefore the Court has jurisdiction to order, if it thinks fit, the costs of the action, as from the date of the summons to intervene, to be paid out of her separate property, including property which is subject to a restraint on anticipation.

The fact that the married woman may have obtained an order giving her leave to intervene in the action "as a plaintiff," followed by a delivery to the defendant of a pleading whereby she "adopts the pleadings of the plaintiff," does not the less render her intervention a "proceeding instituted" by her within the section.

Order of Sir F. Jeune P. affirmed, with a variation.

THIS was a probate action, commenced in April, 1901, in which the plaintiff, Tom Shelton Crickitt, claimed, by the indorsement on his writ, "to be one of the three universal legatees" under the alleged will of his cousin, Miss Annie Blanche Crickitt, who died on February 6, 1901, and to have the will established. Upon a summons for directions the indorsement was ordered to stand for the statement of claim.

The defendant, Henry Blackburn Crickitt, was the father of the deceased, and, as her sole next of kin, opposed the plaintiff's claim on the ground that the will had not been duly executed and that the deceased died intestate; and he asked that letters of administration to her estate should be granted to himself. His wife, Eliza Crickitt, who was living apart from him, was also named in the alleged will, with the plaintiff, as one of the three universal legatees. She was a lady of considerable

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independent means, being entitled to a life interest in a sum of about 46,000*l.* for her separate use without power of anticipation.

In May, 1901, after the pleadings had been closed and the action set down for trial, Mrs. Crickitt took out a summons under the Rules of the Supreme Court, 1883, Order XII., r. 23, for leave to intervene in the action; and by an order made on that summons on May 21, 1901, liberty was given to her to intervene in the action "as a plaintiff." Thereupon, acting by a separate solicitor, she duly entered an appearance to the action as "intervener," and on June 4, 1901, delivered to the defendant a pleading stating that "she adopts the pleadings of the plaintiff herein."

The action was tried in July, 1901, before Sir F. Jeune P. and a special jury, Mrs. Crickitt appearing as intervener by separate counsel, and supporting the plaintiff's claim to have the will established. The jury, however, found by their verdict that the alleged will had not been duly executed, whereupon the learned President, on the application of the defendant's counsel, made a final decree pronouncing against the will with costs; and purporting to act under the power given to the Court by s. 2 of the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), the President ordered that payment of the costs, as against the intervener, should "be made out of her separate property, including property which was subject to a restraint on anticipation."

From that order the intervener appealed on the ground that there was no jurisdiction under s. 2 of the Married Women's Property Act, 1893, or otherwise, to order payment of costs out of the intervener's property which was subject to a restraint on anticipation, she not having instituted any action or proceeding.

The appeal was heard on May 5, 1902.

Lord Coleridge, K.C., and *Barnard Lailey*, for the intervener. Sect. 2 of the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), under which the learned President considered that he had jurisdiction to make the order, enacts that

"In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just."

The question is whether an intervention by a married woman under the well-known practice in probate actions is an "action or proceeding instituted" by the married woman within the meaning of that section. The practice in intervention in probate actions is recognised and sanctioned by Rules of the Supreme Court, 1883, Order XII., r. 23, which says that, "In probate actions any person not named in the writ may intervene and appear in the action as heretofore, on filing an affidavit shewing how he is interested in the estate of the deceased." Here Mrs. Crickitt intervened after the pleadings had been closed and the action set down for trial. Under these circumstances it is submitted that she does not come within the section. The words "action or proceeding instituted" mean some action, or proceeding in the nature of an action, initiated by a married woman as plaintiff, one in which she is the actor or first and prime mover in the sense of having started it: *Hood Barrs* v. *Cathcart.* (1) That was the case of an appeal, and, as Davey L.J. pointed out, one never heard of the expression "instituted" being applied to an appeal, whereas it is an apt word for the commencement of a suit. So here, one does not speak of "instituting" an intervention. In *Hood Barrs* v. *Cathcart* (2) it was held that a counter-claim by a married woman in an action brought against her was a "proceeding instituted" by her; but that was on the ground that a counter-claim was equivalent to and instituted as a cross-action. Then in *Moran* v. *Place* (3) it was held that the entry by a married woman of a caveat against a will was not a "proceeding instituted" by her, on the ground that, though it caused the litigation on the

(1) [1894] 3 Ch. 376. (2) [1895] 1 Q. B. 873.
(3) [1896] P. 214.

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will, the litigation itself was not initiated by her. Again, in *Hood Barrs* v. *Heriot* (1) it was held by the House of Lords, approving of *Hood Barrs* v. *Cathcart* (2), that an appeal by a married woman from a judgment in an action was not a "proceeding instituted" by her, not being a proceeding which initiated litigation. In *Nunn* v. *Tyson* (3) a written notice of claim by a married woman to goods taken in execution, and served by her on the sheriff, was held to be a "proceeding instituted" within the section so as to give the Court jurisdiction, in subsequent interpleader proceedings in which she failed to establish her claim, to order the costs to be paid out of property of hers which was subject to a restraint on anticipation. But the ground of that decision was that the service of the notice was a necessary step in the assertion of her claim which was subsequently enforced by the interpleader summons and proceedings, it being her act, rather than the issue of the summons, which effectively instituted the proceedings. She was in fact in that case the first and prime mover. In the present case, so far from the married woman being the prime mover, the action had gone on, pleadings had been delivered, and the action set down for trial before she intervened. She did not even set up a fresh cause of action, for she simply identified her cause of action with that of the plaintiff by adopting his pleadings. It is submitted, therefore, that in the circumstances of this case there is no jurisdiction under the section to make such an order as has been made here. At all events, if there is such a jurisdiction, the order ought not to extend to the entire costs of the action, but only to such costs as have been occasioned by the intervention.

Sir Edward Clarke, K.C., Gill, K.C., and *J. C. Priestley*, for the defendant. If the section is to bear the narrow construction now sought to be placed upon it, the result will be this—that a successful party in a probate action may lose the protection the Act intends to give him as regards his costs. In the present case the position is this—that Mrs. Crickitt, by having obtained leave to intervene and having adopted the plaintiff's

(1) [1897] A. C. 177. (2) [1894] 3 Ch. 376.
(3) [1901] 2 K. B. 487.

pleadings, is to all intents and purposes in exactly the same position as if she herself had been a party to the issuing of the writ. It is exactly as if she had issued a fresh writ in an action asserting the interest she has. The claim made by the original plaintiff in the indorsement on his writ equally fits her own case, the claim being as "one of the three universal legatees," and that is the pleading she adopts. Then the indorsement is directed to stand for the statement of claim, so that she comes as a plaintiff propounding the will, and is practically an original party to the litigation. In substance, therefore, a party so intervening becomes in reality plaintiff in the whole litigation, and probably he or she may be the only substantial person against whom any remedy may be had by the successful defendant as regards costs.

[COLLINS M.R. Supposing this were the case of a man, and not a woman, intervening, what are the rules regulating his right of intervention in a probate action?]

Besides Rules of the Supreme Court, Order XII., r. 23, there are the Probate Court Rules, 1862, relating to contentious business, and set out in Tristram and Coote's Probate Practice, 13th ed. p. 898, rule 6 of which, referring to the Court of Probate Act, 1857, provides that "parties who previously to the passing of the said Act had a right to intervene in a cause may do so, with leave of the judge or one of the registrars, obtained by order on summons, subject to the same limitations and the same rules with respect to costs as heretofore." These rules are preserved by s. 18 of the Judicature Act, 1875. What the rule as to costs in intervention cases was prior to the rules of 1862 is shewn by *Dyce Sombre* v. *Troup*. (1) There the interveners, the East India Company, because they had made common cause with the executor who had unsuccessfully propounded the will, were condemned with the executor in the costs of the suit. So, *Tennant* v. *Cross* (2) shews that, when a person obtains leave to intervene and plead, he becomes substantially a party to the action for all purposes. As regards the cases cited by the other side, in *Hood Barrs* v. *Cathcart* (3)

(1) (1856) Deane's Ecc. Rep. 22, 118.

(2) (1886) 12 P. D. 4.

(3) [1894] 3 Ch. 376.

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the married woman against whom an order was sought to be made was a defendant, and the Court of Appeal held that the language of the section was not large enough to hit such a case. *Hood Barrs* v. *Cathcart* (1) is really in favour of the defendant. As to *Moran* v. *Place* (2), as pointed out by the Court of Appeal, a caveat is not a notice to any particular opponent: it is only a notice to the officer of the Court not to allow anything to be done in the matter of the will without notice to the person who lodges the caveat: it is impossible to regard that as commencing any litigation. As to *Nunn* v. *Tyson* (3), it was, as the learned judges said, obvious from the facts that, in serving the notice of claim upon the sheriff and so causing the interpleader, the married woman was "instituting" a proceeding. Here the married woman desires to make herself party to a pending probate suit as if she were an original co-plaintiff, claiming exactly what the original plaintiff claimed.

[COZENS-HARDY L.J. Could this lady, according to the practice of the Probate Court, have commenced independent proceedings?]

Yes, certainly.

[COZENS-HARDY L.J. Is, then, this anything more than, in substance, a consolidation of two suits?]

That is what it comes to. If the original claimant had withdrawn, the intervener could have gone on with the action, and if she had succeeded would have been entitled to judgment establishing the will, which was the only matter in question. If the interpretation and limitation the Court is now asked to put upon the section were adopted, the object of the Act would be defeated, which is to prevent a real litigant from escaping the payment of costs simply because she may be a married woman restrained from anticipation.

Lord Coleridge, K.C., in reply.

Cur. adv. vult.

May 6. COLLINS M.R., after stating the facts, and reading s. 2 of the Married Women's Property Act, 1893, continued:—

(1) [1895] 1 Q. B. 873. (2) [1896] P. 214.
(3) [1901] 2 K. B. 487.

In my opinion, this intervention by the married woman, Mrs. Crickitt, was unquestionably an "action or proceeding" instituted by her; and the order was rightly made for the payment of the costs of the opposite party out of her property which was subject to restraint.

But it was said by Lord Coleridge, on behalf of the appellant, that, upon the authorities, this is not a case to which the section applies, because this intervention is not, in the true sense of the section, an "action or proceeding" which can be said to have been "instituted" by a married woman. He says that, in order to give the right conferred by the section against a married woman, you must ascertain whether she is a real actor in the matter, the veritable plaintiff who has started or instituted the proceedings, and that that does not apply to an intervener, that is, a person who has intervened into a ready-made situation and simply taken a part, active or neutral—it does not matter which—in assisting at the dénouement of the matter into which she has intervened. Therefore, he says, the lady in this case, although she was in a sense an actor, was in reality a spectator looking on at an action started by another person, assenting and abetting in carrying it out, and not in any true sense the actor within the meaning of the section as interpreted by the cases. He has referred us to cases which I do not think it necessary to go through at length; but in the case of *Hood Barrs* v. *Cathcart* (1) it has been held that the words "action or proceeding instituted" mean some action, or some proceeding in the nature of an action, initiated by a married woman as plaintiff, and do not include any motion or step made or taken by a married woman in an action in which she is defendant. That was the case chiefly relied on by Lord Coleridge. In another case, *Hood Barrs* v. *Cathcart* (2), it was held that a counter-claim by a married woman was a "proceeding instituted" by her. In another case a notice of claim given by a married woman and resulting in interpleader proceedings was held to be a "proceeding instituted" by her within the meaning of the section. In another case, as to the effect of a caveat, *Moran* v. *Place* (3), a probate action was brought by an executor

(1) [1894] 3 Ch. 376. (2) [1895] 1 Q. B. 873. (3) [1896] P. 214.

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against a married woman in consequence of a caveat entered by her. The action resulted in a verdict for the plaintiff with costs against the defendant, the married woman. The plaintiff then applied under the above section for an order for payment of the costs out of property to which the defendant was entitled subject to a restraint on anticipation; but it was held by the Court of Appeal, affirming Gorell Barnes J., that the proceedings in the probate action were "instituted" within the meaning of the section by the issue of the writ by the plaintiff, and not by the entry of the caveat, or by the appearance of the defendant to the caveat in answer to the plaintiff's warning to enter appearance; and accordingly the application was refused. In substance, that decision amounts to this—that a mere step taken by a defendant in the course of a case cannot be treated as an institution of an action or proceeding within the meaning of this section.

But the real question is whether this section, by the words "action or proceeding instituted," covers the case of an intervention such as took place in the present case. In order to decide that question it is necessary to consider what an intervention is. The rule under the Judicature Act on the subject is stated in Order XII., r. 23, and is as follows: "In probate actions any person not named in the writ may intervene and appear in the action as heretofore, on filing an affidavit shewing how he is interested in the estate of the deceased." That, of course, refers us back to the old practice, and it seems quite clear that, according to that practice, where a probate action has been launched any person interested has the right to come and demand to be heard and to take part—to "intervene"—in the discussion. That intervention may, and does, I think, in such a case, mean the exercise by the person interested of an independent right to assert his or her personal interest by coming in and insisting upon that interest being pressed home to judgment. It may be that the interest of the intervener coincides with that of the plaintiff; and in the present case that was so to this extent, that the intervener was satisfied to take and did take an order giving her leave to intervene "as a plaintiff." But it was perfectly possible, and might have been

very probable, that her interest and that of the original plaintiff might during the progress of the case have become divergent, and that the Court might, in certain contingencies, have felt justified in directing some alteration in the attitude of the intervener. For all practical purposes this lady was an independent person coming to the Court for the purpose of insisting on or asserting her own right, which might or might not be consistent with that of the plaintiff who first started the action. It so happened that the two rights were consistent, the assertion of both being conducted on parallel lines; but she was just as much an actor in the matter as the original plaintiff. She had an independent right which might or might not have coincided with that of the original plaintiff; and is it to be said she has not intervened merely because her own right asserted by her intervention coincided with that of the original plaintiff? It seems to me that she was an actor who, by intervening, had "instituted" a proceeding within the meaning of the section, and that, therefore, the learned judge had the jurisdiction—we have no question of discretion to consider here—to make the order now appealed from for payment of the costs of the opposite party; but I think the order should be limited to payment of the costs from and after the date of the intervention.

STIRLING L.J. I am of the same opinion. The case arises in this way. A will is brought forward for probate under which three persons become entitled to the residuary estate of the testatrix in equal shares. The person who brings forward the will is one of those persons, and the will is opposed by the next of kin. An action is then brought by one of the three residuary legatees against the next of kin for the purpose of establishing the will.

Now, one of the other persons who is entitled under the same will to an equal share of the residue is a married woman. She was under no obligation to appear or take any part in this action, but she had a right given her by Order XII., r. 23, to intervene if she thought fit, and take part in the action. She did so intervene, under an order made on May 21, 1901, giving her liberty to intervene "as a plaintiff." Subsequently she

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delivered a pleading by which she said "that she adopts the pleadings of the plaintiff herein."

Now, what was the effect of that? The effect was, as I conceive, not that she became co-plaintiff with the original plaintiff in the action, for by her pleading she in fact treats the plaintiff as a separate and distinct person: she calls herself the intervener, and says she adopts the pleadings of the plaintiff. So that the original plaintiff in the action remains, but she intervenes "as a plaintiff," meaning thereby that she takes the side of the plaintiff and supports his view. She is not, however, bound to adopt all the proceedings which he takes; she may pursue an independent course, though this may be a parallel course with that of the plaintiff. She was not bound by the proceedings of the plaintiff, for if he had determined to discontinue the action, she might have continued it herself; if she was dissatisfied with the result, she might go on even though the plaintiff did not.

It seems to me, therefore, that the proceeding on her part by which she obtained leave to intervene constituted a "proceeding instituted" by a married woman, and was a proceeding in which she was "the first and prime mover" within the meaning of that expression as used in the case of *Hood Barrs* v. *Cathcart.* (1)

I think therefore that, with the variation already alluded to, the order of the learned judge ought to be sustained.

COZENS-HARDY L.J. I am of the same opinion.

Some difficulty has been occasioned by reason of the peculiar position of interveners. Interveners were not known to the Common Law Courts, and I think there is a fallacy in attempting to treat an intervener as though, by such an order as was made in the present case, he or she becomes for all purposes a co-plaintiff. That cannot be so, because co-plaintiffs have no right to appear by a separate solicitor or separate counsel; one co-plaintiff cannot discontinue and leave the other to go on. Co-plaintiffs are tied together, and must appear by the same solicitor and by the same counsel through-

(1) [1894] 3 Ch. 376.

out. We are dealing, in fact, with a mode of proceeding peculiar to the Probate Court. By rule 6 of the rules as to contentious business in that Court, it was provided that parties who previously to the passing of the Court of Probate Act, 1857, had a right to intervene in a cause might do so by leave obtained on summons, subject to the same limitations and the same rules with respect to costs as theretofore.

Now, it seems to me that the system or practice of intervention is really part of the canon law administered by the Ecclesiastical Courts. In Burn's Ecclesiastical Law, 9th ed. vol. iii. p. 186, there is this quotation: "Tertius intervenire potest pro interesse suo in omni causâ quæ tangit bona aut personam suam"; and although interveners were not known to the common law, yet in the Court of Chancery there are well-known proceedings *pro interesse suo* which, I apprehend, were simply adopted from the civil law in a peculiar class of cases. For instance, if a receiver in an action between A. and B. were in possession, and C. claimed to be interested in the property, C. applied *pro interesse suo* to be examined, and he thus came into the action and asserted, with the leave of the Court, his right to the property. I apprehend that when a person comes in under that proceeding *pro interesse suo* he initiates litigation —none the less that he initiates it in form in an action that is still pending.

Now, applying that analogy and those principles to the present case, it seems to me impossible to doubt that this lady, when she intervened and appeared by her own solicitor and by her own counsel, did initiate proceedings against the opposite party.

It follows, therefore, that the case comes precisely within the language of s. 2 of the Married Women's Property Act, 1893; but I think it will be more correct to exclude from her liability the costs prior to the date of the intervener summons.

Appeal dismissed.

May 15. The matter was again mentioned to the Court upon the question whether the costs of the appeal should follow the

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costs in the Court below, and be paid out of Mrs. Crickitt's separate estate.

THE COURT directed that payment of the costs of the appeal, as against the appellant, the intervener, should also be made out of her separate property, including property which was subject to a restraint on anticipation.

Solicitors: *G. B. Crook; Milles, Jennings-White & Foster.*

G. I. F. C.

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IN THE GOODS OF RUFUS KIRBY.

Probate—Executors according to the Tenor—Trustees—Direction for Advancement and Maintenance of Children.

A testator by his will directed the payment of his debts and funeral and testamentary expenses by his "executors hereinafter named," but failed to name any persons as executors. The will contained certain specific legacies and an expression of the testator's wishes as to the education and advancement of certain of his children, the cost of such education and advancement to be taken out of their several estates, and the remainder to be invested in freehold ground rents. The will proceeded to appoint the testator's widow and two of his sons as "trustees," gave certain bequests to the latter "for their services," and disposed of the residue of the testator's property:—

Held, that the trustees were executors according to the tenor, and entitled to probate.

MOTION for probate to three persons named as trustees in the will of Rufus Kirby, deceased.

The will, which was dated June 18, 1900, after revoking all testamentary dispositions theretofore made by him, directed that "all my just debts, funeral and testamentary expenses be paid by my executors hereinafter named," and then, after giving certain specific legacies, proceeded: "I wish my children (naming three) to be educated at the board school until the age of ten; after that to be sent to a good boarding school where the trustees should think proper to send them. The costs of educating them and providing are to be taken out of

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the rents of their several estates. The remainder to be invested in ground rents freehold. I also make my wife Emma, and Seaton Charles and William, my sons, trustees, which for their services I give Seaton Charles four leasehold houses—1 to 7, Elderton Road, and I give to William 9 to 15, Elderton Road, Sydenham. I also give to my two sons Rufus and Arthur Robert and my daughter Ethel Emma the whole of the residue, to be equally divided between them. . . ."

No property was vested by the will in the trustees.

Norman Craig, moved for probate to them as executors according to the tenor, or, in the alternative, for a grant of administration to them, under s. 73 of the Probate Act, 1857, with the will annexed. The duty with regard to advancement would be that usually left to executors. *In the Goods of the Earl of Leven* v. *Melville* (1) is somewhat in point.

[JEUNE P. The report of that case shews that the will was found inclosed in an envelope, on which, in the testator's own handwriting, were the names of the four trustees, and against their names the word "executors."]

Here there is nothing vested in the trustees, and, unless they are executors according to the tenor, they have nothing out of which they can pay for the education and advancement of the children. If the Court does not grant probate to the trustees, the widow will have to administer the estate until the majority of the eldest infant, and if the widow should happen to die before that event, the person who in this case would probably be entitled to a grant would not be a desirable person.

JEUNE P. The testator's intentions with respect to his younger children's education and advancement are fairly clear from the terms of the will. He has named three persons as trustees; but, inasmuch as there is no vesting in them of any trust property, and he did, in an earlier part of the will, express an intention to appoint executors, I think I may fairly say that he used the word "trustees" loosely, and that he

(1) (1889) 15 P. D. 22.

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really meant the persons so named to be his executors. I therefore grant probate to them, as executors according to the tenor.

Solicitor: *Edward Chester.*

H. D. G.

C. A.

1902

May 7.

[IN THE COURT OF APPEAL.]

BLOOD *v.* BLOOD.

Divorce — Variation of Settlements — Vested Interest of Child — Respondent Husband next of Kin—Extinguishment of all Respondent's Life and Derivative Interest—Property settled—Matrimonial Causes Act, 1859 (22 & 23 *Vict. c.* 61), *s.* 5—*Form of Order.*

The Court has jurisdiction, under s. 5 of the Matrimonial Causes Act, 1859, to make, in favour of a petitioner, the wife, an order affecting settled property, even after a child of the dissolved marriage has attained a vested interest, by extinguishing all the rights, powers, and interests of the respondent, the husband, over the petitioner's settled fund, including any beneficial derivative interest as next of kin of his deceased child.

Crisp v. *Crisp*, (1872) L. R. 2 P. & M. 426, discussed.

Decision of Gorell Barnes J., [1902] P. 78, affirmed with a variation in the form of order.

APPEAL from a decision of Gorell Barnes J. (1)

The case is fully reported below, and the following short statement of the facts will be sufficient.

By an ante-nuptial settlement of July, 1877, the fortune of the intended wife was vested in trustees upon trust to pay the income to the wife for life, on her death to the husband for his life, or until bankruptcy, and on the death of the survivor to hold both capital and income in trust for the children of the intended marriage in the usual way, sons taking a vested interest at twenty-one. In default of children attaining a vested interest, the wife's fortune reverted to her in the usual way. The settlement also contained a proviso, that if the wife should survive her husband and marry again, and there should be only one child of the marriage, the wife should have power

(1) [1902] P. 78.

to appoint the income of a moiety of her fortune to her future husband for his life, and after his death to appoint the said moiety in favour of the children of such second marriage. The only child of the marriage attained twenty-one, and died in July, 1900, a bachelor and intestate.

The wife obtained a divorce from her husband on the ground of his adultery and desertion, the decree nisi being pronounced on June 12, 1900.

On January 14, 1901, the decree nisi was made absolute.

On a motion upon the registrar's report, on a petition to vary the above settlement, a question was submitted for the consideration of the Court, whether the interest of the husband, the respondent, derived as representative of his son could be extinguished. No representation had, as a fact, been taken out to this deceased son at the time.

Gorell Barnes J. held that the Court had power, under s. 5 of the Matrimonial Causes Act, 1859, to make an order in favour of the petitioner affecting the settled property, even though a child of the dissolved marriage had attained a vested interest. (1)

The respondent appealed.

Inderwick, K.C., and *Barnard*, for the appellant. The life interest of the respondent, the husband, under the settlement may be affected or extinguished by the Court under s. 5 of the Matrimonial Causes Act, but there is no jurisdiction to extend that order to the vested interest of the child of the marriage, so as to deprive the father of his right to take out representation to his deceased son. *Meredyth* v. *Meredyth and Leigh* (2) is no authority for an order of this kind. When this property vested in the son it was no longer settled; there is therefore no settled property for the Court to deal with under this section.

[COZENS-HARDY L.J. The trustees of the settlement would be bound to retain possession of the fund: *In re Radcliffe, Radcliffe* v. *Bewes*. (3)]

(1) For form of order then made, see [1902] P. at p. 84.

(2) [1895] P. 92.

(3) [1892] 1 Ch. 227.

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As far as the son's interest is concerned, which is what the respondent would be entitled to, this fund was freed from any trusts, and was no longer settled: *Micklethwait* v. *Micklethwait* (1); and the Court has no jurisdiction over it.

The Court has no power to vary a settlement so as to deprive a child of the marriage of any interest secured to it by that settlement: *Crisp* v. *Crisp* (2); *Pollard* v. *Pollard* (3); it cannot alter or vary a vested interest. The order, so far therefore as it affects the respondent's beneficial interest as next of kin of his deceased son, is wrong.

Hon. Frank Russell (*Priestley* with him), for the wife, the petitioner. The words of the section are very wide, and give the Court the fullest power over the property settled, as this fund clearly still is. In *Crisp* v. *Crisp* (2) the Court only considered that it had no power to put an end altogether to the settlement. In *Whitton* v. *Whitton* (4) the reversionary interests of the children of the marriage were dealt with and affected under this section. The crucial date is the date of the decree nisi: *Dormer* v. *Ward*. (5)

[STIRLING L.J. If you get an order varying the settlement by extinguishing all the rights, powers, and interests of the husband in this fund, including any beneficial derivative interest as next of kin of his deceased son, that ought to be enough.]

That will be quite sufficient.

F. L. Wright, for the trustees, agreed that if the order was taken in that form it would leave the matter open should the son have incurred any debts or made any mortgage or assignment of his reversionary interest.

COLLINS M.R. This is an appeal from the decision of my brother Barnes affecting the interest of the husband, against whom a decree for divorce has been obtained by the wife. The learned judge acted under s. 5 of the Matrimonial Causes Act, 1859, which is in these terms: "The Court after a final decree

(1) (1858) 4 C. B. (N.S.) 790, at p. 858.
(2) L. R. 2 P. & M. 426.
(3) [1894] P. 172.
(4) [1901] P. 348.
(5) [1901] P. 20.

of nullity of marriage or dissolution of marriage may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as the Court shall think fit." [Having shortly stated the facts of the case and the result of the order appealed from, the learned judge continued :—]

The appellant, the husband, says that that order ought not to extend to the share which passed to the son, or would have passed to the son, who died before the decree in question was made absolute. The son died without a will, and the father, as next of kin, could take whatever the son's interest was on obtaining letters of administration to him.

Now as to the order—which extends not only to the father's life interest, but to the fund which he takes, whatever it may be, if he takes as next of kin to his son—it is said that it was made without jurisdiction—that there was no power to deal with that fund at all, inasmuch as the power of the judge is limited by the section which I have read to a settlement and to "property settled"; and it is said that, this father claiming as next of kin of his son, there was no property settled, and that, therefore, there is no jurisdiction to deal with the fund at all. The answer to that objection is this. The wording of the section is this: "may make such order with reference to the application of the whole or a portion of the property settled." The question, therefore, is, Is this property, with respect to which you may make the order, settled or not settled? At the time when the application was made there were two outstanding life interests in the fund, and obviously the fund was in the custody of the trustees for the purpose of the settlement, and of giving the two successive life tenants the benefit of the life interest to which they were entitled before the estate in remainder came into existence at all. One of those life estates had been extinguished under this order, and that was an order dealing with settled property. There was no mistake about that. Therefore there was clearly jurisdiction to make it.

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Collins M.R.

That disposes of the right of the Court to deal with the share or sum coming to the father as next of kin to his son.

Then it is said also that the order under appeal is not an order which the Court has jurisdiction to make, even dealing with it as settled property, because it is said that it affects the interests of the child of the marriage, and that, rightly understood, the words that I have read in this section, though they do enable the Court to annihilate, or diminish, or vary the interest of the parents or either of them—the delinquent parent—in the subject-matter of the settlement, do not allow the Court to diminish or annul the interest of a child or children. It is not necessary to decide that point here. I cannot say that I have been much influenced by the argument upon which it was based, nor do I think that the authority that was most relied upon as supporting it, namely, *Crisp* v. *Crisp* (1), when fairly construed, goes to that extent or anything like it. But I do not think it necessary to deal with it on the decision of this case, because I think the order here certainly ought to be to vary the settlement by extinguishing the life interest of the father, including any beneficial interest of the father as next of kin of his deceased son. That order, which will give effect to all that is really necessary to carry out the intention of the learned judge, gets rid of any difficulty or any possible difficulty as to want of jurisdiction to deal with the interest of the son.

There were two points relied upon, namely, that there was no jurisdiction at all, because this was not settled property, and that if there was jurisdiction to deal with it as settled property, there was nevertheless a want of jurisdiction to in any way affect or diminish the interest of a child. It seems to me that both those points fail, and that the order that I have stated, and which my brother Stirling first suggested, is the proper order that ought to be made, and gets rid of any possible difficulty in this matter.

Therefore, in my judgment, the appeal ought to be dismissed.

STIRLING L.J. I am of the same opinion.

The section gives the Court power "to make such orders

(1) L. R. 2 P. & M. 426.

with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as the Court shall think fit." The first question which is to be considered is whether there is here "property settled" within the meaning of the section. Prior to the making of this order which is appealed from, the property stood limited thus: upon trust for the wife during her life, then for the husband during his life, and then for the only child of the marriage, who had died intestate. In point of fact, no representation has yet been taken out to the son; he has no legal personal representative; but his sole next of kin is his father, the husband in this particular case.

Now, in that state of things, it seems to me that there was property settled. There were two subsisting life interests before you come to the reversion which belonged to the legal personal representative of the son; and the words of the section seem to me ample to give the Court power to deal with the trust funds as settled property. But then this is also said—that the Court in dealing with property settled will not so deal with it as to deprive any person of a vested interest under the settlement, not being, of course, either the husband or wife, one of whom must necessarily be a guilty party. It certainly is a very strong thing to confer a power on any Court to alter vested interests in property; and there appears from the reported cases to have been a strong objection on the part of the judges of the Court to deal with property in such a way as to disturb vested interests. But none of the cases which have been cited go the length, as it appears to me, of saying that there is no jurisdiction to do it. The case which was most relied upon is that of *Crisp* v. *Crisp* (1); but what the learned judge held there as being beyond the power of the Court was, not to modify the interests under the settlement, but to extinguish it altogether; and, if I may respectfully say so, I entirely agree. It appears to me that except so far as the Court, in the exercise of the jurisdiction conferred upon it, sees fit to alter the provisions of the settlement for the benefit either of children of the marriage or for one or other of the parents, the settlement must remain,

(1) L. R. 2 P. & M. 426.

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Stirling L.J.

and that the Court has no power to extinguish it. The result of the cases appears to me, if I may say so, to be correctly summed up by the President in the case to which we have been referred of *Whitton* v. *Whitton*. (1) There the President says (2): "I am clear I have jurisdiction to do so"—that is, to alter a vested interest—" and I think no case has ever thrown doubt on that; the case of *Pollard* v. *Pollard* (3) certainly does not throw doubt on the jurisdiction. But one has in these cases to consider what is really for the benefit of the children, because I think the authorities shew that nothing must be done that on the whole would be for the disadvantage of the children. This does not so much turn on the words of the Act of Parliament, but generally on the principle that the children, being innocent parties, ought not to have their interests injuriously affected by the conduct of either of their parents." Here, we are not prejudicing a child. The order which has been made does not affect the child. The child is dead. The interest of the child will become vested in the husband on his taking out administration, but it is only the beneficial interest of the husband as next of kin of the child that is proposed to be affected by the order as modified. It seems to me that that is not open to the objection which is pointed out by the President in *Whitton* v. *Whitton* (1), and is within the powers of the Court.

I think that the order ought to be modified so as simply to provide that the settlement be varied by extinguishing all the rights, powers, and interests of the respondent, the husband, including any beneficial derivative interest as next of kin of his deceased son, in, concerning, or over the whole or any part of the capital and income of the petitioner's settled funds—stopping there; so that when the legal personal representative of the son is appointed, such application may be made to the trustees as may be right; and nothing ought to prejudice the rights of any persons deriving title from the son, whether they be mortgagees, or assigns, or creditors, or any other person except the father.

(1) [1901] P. 348. (2) [1901] P. at p. 353.
(3) [1894] P. 172.

COZENS-HARDY L.J. I entirely agree.

It was argued here, although it was not argued in the Court below, that this was not settled property. It seems to me that a property is none the less settled because all the persons beneficially interested may be sui juris and capable together of dealing with it. Then, assuming it to be settled property, I desire to express my entire agreement with the view of Gorell Barnes J., and the Master of the Rolls and Stirling L.J., as to the jurisdiction of the Court to extinguish, in a proper case, an interest, although vested, of a child. In the present case I do not think it is necessary for us really to consider that, because the order as proposed to be altered merely affects the interest of the husband, the father—the guilty party. It affects his own original life interest, and it affects such interest as he has beneficially as sole next of kin of his deceased son. Administration, of course, will have to be taken out, and then one other possible difficulty may very easily be got over—that if the wife should marry again she has, according to the settlement, a certain power of appointing a life interest in favour of a second husband, and appointing half of the fund in favour of the children of the second marriage; but that is a power which she can release, and, when that is done and administration is taken out, there will be no difficulty.

Solicitors: *Valpy, Peckham & Chaplin; C. Russell & Co.; Hugh Wharton.*

Appeal dismissed.

The material portion of the order as drawn up was as follows:—

"The Court doth order that the Order of 18 November, 1901, be varied, and that the life interest of the respondent and all the rights powers and interests of the respondent, including any beneficial derivative interest of the respondent as next of kin of his son, in concerning or over the whole or any part of the capital and income of the petitioner's settled funds be extinguished and do vest in the petitioner, but without prejudice to the rights of any persons deriving title from the son, whether they be mortgagees or assignees or creditors or any other person except the respondent. And it is further ordered that this appeal be dismissed, and that the respondent do pay the petitioner's and trustees' taxed costs of this appeal."

W. C. D.

1902
June 10.

PIPER *v.* PIPER.

Desertion—Deed of Separation—Bar—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39).

If a wife, having cause of complaint, under the Summary Jurisdiction (Married Women) Act, 1895, against her husband on the ground of desertion, enters into a valid deed of separation, the effect is to put an end to any desertion theretofore existing.

Quære, per Sir F. Jeune P.: Whether a complaint, if made within six months after the deed, could properly be entertained.

APPEAL from justices.

The parties were married in 1877, and had two children, a son, born in 1879, and a daughter, born in 1893.

Before 1896 and in the early part of that year the wife complained of her husband's conduct, and, from February to April, though under the same roof, she had no marital intercourse with her husband, who, during that period, refused to provide money for the housekeeping, and finally left her on April 16, 1896.

On June 3, 1896, a deed of separation was executed by the parties, but the husband paid nothing for about nine months. Eventually the wife recovered something by means of legal proceedings, but for more than two years before April, 1902, she received nothing from him.

On April 4, 1902, she took out a summons against him for desertion, and on April 25 the justices of the petty sessional division of Romsey, in Hampshire, ordered a separation, with custody of the daughter, and an allowance of 15*s.* weekly.

From that order the husband appealed, on the grounds (inter alia) that there was no evidence, or not sufficient evidence, of desertion; and that, upon the facts before the justices, no order ought to have been made.

Francke, for the appellant. There could be no desertion to ground the order, in view of the deed of separation. The deed was a bar: *Reg.* v. *Leresche.* (1)

[He was stopped by the Court.]

(1) [1891] 2 Q. B. 418, 421.

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Frampton, for the respondent (wife). The justices presumably distinguished that case. It was urged before them on the wife's behalf that there had been fraud on the part of the husband in inducing her to enter into the deed. The fact that he paid nothing whatever under it for nine months immediately following its execution is evidence of his fraudulent intent. The wife had issued, or was contemplating, a summons against him, and it was to avoid the publicity of those proceedings that he fraudulently promised to pay the allowance, never intending to pay it. The deed is no bar: *Nott* v. *Nott*. (1)

[THE PRESIDENT. In *Parkinson* v. *Parkinson* (2), also decided by Lord Penzance, the ratio decidendi in *Nott* v. *Nott* (1) is stated to have been that the wife never agreed to live separate and apart from the husband, and that the party whose execution of it would have made it an efficient and binding agreement, namely, the trustee covenanting on behalf of the wife, never signed it, and so the document was never completed. On that ground *Nott* v. *Nott* (1) was distinguished, and Lord Penzance held that Mrs. Parkinson had, upon the execution of the deed, bargained away her right to relief on the ground of desertion.]

Dagg v. *Dagg and Speake* (3) is another instance of an agreement to separate obtained by the husband upon improper grounds.

[THE PRESIDENT. The document there was a wicked and abominable one on the face of it.]

The justices were entitled to draw inferences from the facts proved before them as to the husband's conduct in paying nothing for nine months after the deed was executed, and then only paying under compulsion and to a very limited extent. The state of the man's mind and intention is a fact upon which the justices might come to a conclusion, and a misrepresentation as to the man's intention to pay would be a misstatement of fact: *Edgington* v. *Fitzmaurice*. (4) The Court should "reject this deed as a false transaction and regard the real object which lay underneath," which, in the

(1) (1866) L. R. 1 P. & M. 251.
(2) (1869) L. R. 2 P. & M. 27.
(3) (1882) 7 P. D. 17.
(4) (1885) 29 Ch. D. 459, at p. 483.

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present instance, was the avoidance of publicity by criminal proceedings: *Crabb* v. *Crabb*. (1)

[GORELL BARNES J. Even if your contention were right, has she not approbated the deed by suing upon it?]

THE PRESIDENT (SIR F. H. JEUNE). The respondent in this appeal is met by the insuperable difficulty of this deed. I will assume in her favour that there was desertion in the month of April, 1896; but then there comes the deed of separation in the June following. Her counsel endeavours to get out of the difficulty by suggesting, as he says was also suggested by the solicitor when before the justices, that the deed was procured by fraud on the part of the present appellant, and that it ought, therefore, to be treated as null and void. There is, however, no evidence to support that contention. The most that can be said—and I do not think even that is proved—is that the husband never intended to keep its terms at the time when he entered into it. I doubt very much whether evidence of such a fact could be received as impugning a deed; but, even if it were received, it would fall far short of shewing that there was fraud. In the present case it appears that the wife, at the time when she entered into the deed, was represented by a solicitor, and that goes a long way towards negativing fraud. The fact that the husband did not pay the allowance provided by the deed does not prove that he entered into it with a fraudulent intent. *Crabb* v. *Crabb* (2) is no doubt an authority for the proposition that if a deed were merely a fraudulent transaction on the part of one of the contracting parties—"if a man," as was said at the end of the judgment in that case, "determining to abandon his wife, were to set about fraudulently, by the show of an agreement, which he intended never to fulfil, to induce or extort her consent to their mutual separation, covering his true purpose under delusive covenants, and seeking a shield for his design in a consent bought by treachery, the Court might well be asked to reject the false face of the transaction, and regard the real object that lay underneath."

But it must, in the first instance, be shewn by the party

(1) (1868) L. R. 1 P. & M. 601, 604. (2) L. R. 1 P. & M. 601.

alleging the fraud that there was the extortion of consent; and in the present instance there is only the evidence that the husband did not fulfil his bargain. Under these circumstances, it would be improper to hold or to guess that this deed was procured by fraud; and there is, moreover, no evidence before us to shew that the justices ought to have thought, or did think, that the deed was bad and ought to be set aside. If, then, the deed was valid, there is, in my opinion, an end of the case, for the effect of the deed was to put an end to the desertion, which I am assuming, in the wife's favour, to have previously commenced. If there was, in fact, desertion in April, 1896, it was put an end to in June, 1896, by the execution of the deed. By executing that document the wife bargained away whatever rights she had in return for what was apparently good consideration, which, moreover, she appears to have, later on, to some extent enforced. The effect of bringing the desertion to an end was to make it a wrong done only in 1896—that is, long before the jurisdiction of the justices who made the order was invoked. It is quite true that justices have power, under the Act of 1895, to make orders in respect of desertion irrespective of any definite period—not, as under the Matrimonial Causes Acts in suits instituted in this Court, only if the desertion has continued for two years and upwards. But under the Summary Jurisdiction Acts the desertion alleged must, in order to found jurisdiction, have continued till within six months before the parties come before the Court of first instance. Therefore, although the jurisdiction of the justices might perhaps have been invoked, that could only have been done within six months from the date when the desertion was put an end to. This appeal must, therefore, be allowed; but, inasmuch as the respondent came here with the object of supporting the order which had been made in her favour, she is entitled to her costs in this Court.

GORELL BARNES J. In this case it is unfortunate that the justices and their clerk have not followed the suggestion we have made so often in these appeals, that the reasons which induced the decision should be stated and should be shewn

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Gorell Barnes J.

upon the notes. We have not got upon these notes any reasons for the justices' decision, and the only suggestion put forward by counsel is that they may have based their decision upon the alleged ground that the deed was fraudulently obtained. But if that was the ground upon which the decision rested, it appears to me that the order cannot stand, because there is no evidence of fraud. We are told by counsel for the appellant that the deed was arranged between the husband's solicitor on the one side and the wife's solicitor on the other; but, be that as it may, there is no evidence to impugn its validity. It is merely stated by counsel for the respondent that the solicitor who appeared for her before the justices argued that there had been fraud in obtaining the wife's assent to the deed, and it is impossible to imagine on what other ground the justices can have based their decision. But when any question as to the validity of the deed is removed, the wife has clearly, by entering into it, put an end to any desertion which may have theretofore existed, and from the date of the deed the parties must be treated as living apart by mutual agreement. I agree, therefore, that this appeal must be allowed.

Solicitors for appellant: *Robbins, Billing & Co., for C. A. Emanuel & Emanuel, Southampton.*

Solicitors for respondent: *W. & W. Stocken, for E. D. Godwin, Southampton.*

H. D. G.

AYLWIN *v.* AYLWIN.

1902
June 12.

Probate—Probate Suit—Costs.

Where a principal beneficiary takes instructions himself and causes a will to be prepared by a solicitor upon those instructions, but the solicitor does not see the testator, the circumstances so far invite inquiry as to justify the Court in refusing to condemn in costs a party opposing probate of the will.

THE plaintiff, as sole executor, propounded the last will, dated April 11, 1899, of James Aylwin, who died on November 9, 1901.

The defendant, an adopted daughter of the testator and nterested under a former will, executed by the deceased in 1896, had entered a caveat, and, in her statement of defence and counter-claim, pleaded undue execution, unsoundness of mind, memory and understanding, and want of knowledge and approval of the last will; and she counter-claimed probate of the will of 1896, as contained in a copy thereof, filed with the scripts.

In his reply, the plaintiff joined issue on the defence, and, as to the counter-claim, pleaded revocation of the earlier by the later will.

Ashton Cross, for the plaintiff, having given formal proof in support of the last will, asked for judgment with costs.

Barnard, for the defendant. No order for costs should be made against the defendant. The person chiefly interested took instructions for the will, communicated the purport of those instructions to a solicitor, who then prepared the will and handed it to the person so instructing him. The solicitor did not see the testator. Under those circumstances, the defendant caused inquiries to be made, and, having seen the attesting witnesses about a month after the close of the pleadings, ascertained from them that the person who obtained the will, and was mainly interested under it, was not present

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when it was executed; and, further, the defendant then ascertained for the first time that the testator himself asked the witnesses to attest his signature, and afterwards thanked them for doing so. The plaintiff's answers to interrogatories admit most of those facts. The defendant gave notice that she would not further oppose probate.

Ashton Cross, in reply. The defendant ought not to have contested the last will. The estate passing under the will is comparatively small.

JEUNE P. The defendant's contention is right. Where a person, who is to derive a substantial benefit under a will, himself takes instructions for it and does not cause the solicitor who prepares it to intervene at any material time, the circumstances are such that they so far invite inquiry as to justify the Court in holding that there ought to be no order for costs against a defendant who has been put upon inquiry.

Solicitors for plaintiff: *Wakeford, May & Woulfe.*
Solicitors for defendant: *Lewis & Lewis.*

H. D. G.

In the Goods of FRANCES PEVERETT.

1902
June 23.

Probate—Informal Document—Execution—Witnesses Dead—No Attestation Clause—No Evidence of Handwriting of one Witness—Presumption: "Omnia præsumuntur rite esse acta."

The Court (Sir F. H. Jeune P.) extended the presumption of law—"Omnia præsumuntur rite esse acta"—to the case of an informal holograph document containing no attestation clause whatever, and in regard to which there was no evidence to prove the handwriting of one of the persons (both of whom were dead) whose names appeared near the signature of the testatrix at the foot or end of the document.

Motion for administration with a document, which was put forward as a will, annexed.

Frances Peverett, late of Little Shelford, in the county of Cambridge, died on December 24, 1901, a widow, without child or parent, leaving Elizabeth Johnson, Robert Adams, and Richard Adams, her natural and lawful sister and brothers and next of kin, her surviving.

The deceased left a holograph document in the terms following:—

"1893.

"Septr. 14. Mrs. Frances Peverett wishes her sister Elizabeth Johnson to have all and every wearing things and wach [*sic*] and all my sister and money that is Frances Peverett and Mrs. Richard Gardner to have silver butter dish and casters and Mrs. Graham to have my gold pebble broch [*sic*] and my sister Elish. Johnson to have all my other guiley [*sic*].

"Mary Ann Brand, Sep. 14, 1893, sine these wishes.

"Frances Peverett.

"Elizth. Ansell, Septr. 14th, 1893.

"Sign, Frances Peverett.

"Septr. 14th, 1893."

From the affidavit of Elizabeth Johnson, who applied to the Court to admit the document as a will and to make a grant to her of administration with the said will annexed, as the residuary legatee therein named, it appeared that the whole

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document, with the exception only of the signatures "Mary Ann Brand" and "Elizth. Ansell," was in the handwriting of Frances Peverett; and, further, that Richard Adams, one of the brothers, had been for about forty years, and still was, resident in Australia, and that he had no notice of this application.

The other brother, Robert Adams, was served with notice, but was not represented.

Both the attesting witnesses had died since the date of the document. Inquiries had failed to produce any evidence as to the handwriting of Mary Ann Brand, who had lived in a cottage near to Mrs. Peverett. The handwriting of the other attesting witness was, however, proved by an affidavit of her daughter.

The deceased died possessed of no realty, and her personal estate consisted of 40*l.* cash in the house where she had lived, 199*l.* cash at a bank, and household furniture and effects of the estimated value of 10*l.*, making a total of 249*l.*

R. H. Pritchard, for the applicant, asked the Court to treat the document as a will and to presume due execution. *In the Goods of Puddephatt* (1) is the nearest reported case to this. The presumption of law that everything has been rightly done has been held to apply in cases where the attestation clauses were defective: *Vinnicombe* v. *Butler*. (2)

[THE PRESIDENT. Is there any authority dealing with the case where no attestation clause whatever appears on the document? There is nothing in the present case to shew why these two people put their names to this document, which appears to be in the handwriting of the testatrix and signed by her.]

Why should two people sign at all, if not as witnesses? The Court leans more towards testacy than intestacy. [He also referred to *In the Goods of Casmore*. (3)]

JEUNE P. There is no authority covering this case. Two things may be laid down as general principles. The first is,

(1) (1870) L. R. 2 P. & M. 97. (2) (1864) 3 Sw. & Tr. 580.
(3) (1869) L. R. 1 P. & M. 653.

that the Court is always extremely anxious to give effect to the wishes of persons if satisfied that they really are their testamentary wishes; and, secondly, the Court will not allow a matter of form to stand in the way if the essential elements of execution have been fulfilled. Those are principles which I can act upon, although I am conscious that in this case, where there is no attestation clause at all, I am going to the furthest limit. There are reported cases, some of which have been cited, where there were attestation clauses more or less imperfect, and where the Court has inferred that the papers were testamentary and has presumed that they were properly executed. In the present case I am willing to take the further step of allowing the presumption to prevail, although there is a total absence of attestation clause.

I find that the document before me was signed by the testatrix, and that there are upon it the signatures of two persons who are both dead, and one of whom, at any rate, was a person who was not unlikely to be a witness to a document for the deceased, and the signature of the other of whom is proved. With these facts found, I look at the document, and, irregular and informal as it is, I am justified in holding that the testatrix did intend it for her will. It was signed by her and by two other persons, and, although there is nothing on the face of the will to shew it, I hold, on the principle "Omnia præsumuntur rite esse acta," that it was signed first by the testatrix and then by the two other persons as witnesses, all three being present at the same time. On this finding, that the document was duly executed as a will in accordance with the statute, I grant the applicant administration with the will annexed.

Solicitors: *Field, Roscoe & Co., for Ginn & Matthew, Cambridge.*

H. D. G.

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June 17, 18.

[IN THE COURT OF APPEAL.]

THE OVINGDEAN GRANGE.

Admiralty—Collision—Negligence—Contributory Negligence—Thames By-laws, 1898, *art.* 47.

The plaintiffs' steam vessel, proceeding down the river Thames against the tide, neglected—in breach of art. 47 of the Thames By-laws—to wait before rounding Blackwall Point "until any other vessels rounding the point with the tide (had) passed clear," and came into collision with the defendants' steam vessel which had come up the river, and was, at the material time, in process of turning preparatory to entering the West India Docks.

The defendants' vessel was found to blame for negligently failing to execute the manœuvre of turning with due regard to the passing traffic, and the plaintiffs' vessel was also found to blame for hampering the manœuvre of the other vessel. The plaintiffs appealed:—

Held, by the Court of Appeal (Collins M.R., Mathew and Cozens-Hardy L.JJ.), affirming the decision of Sir F. H. Jeune P., [1901] P. 127, that the plaintiffs' vessel was to blame, for, through the breach of art. 47, she had brought herself into a position in which she placed the defendants' vessel in a difficulty, and threw upon those in charge of that vessel the obligation of exercising more than ordinary care.

The Margaret (*Cayzer* v. *Carron Co.*), (1884) 9 App. Cas. 873, distinguished.

APPEAL by plaintiffs, the owners of the *Forsete*, against so much of a decision of Sir F. H. Jeune P. (1) as found their vessel to blame for a collision as well as the defendants' vessel.

The facts, so far as material, were shortly as follows:—

On August 22, 1900, about 8.30 A.M., the weather being fine and clear, the tide one-third flood of the force of about two knots, and the wind fresh from the south-west, the Norwegian wooden steam vessel *Forsete*—of 318 tons register, with thirteen hands and a pilot, from London to Grimsby in ballast—was proceeding down the lower part of Blackwall Reach in the river Thames, keeping to the southward of mid-channel, at a speed of four to five knots, when she came into collision with the British steam vessel *Ovingdean Grange*, of 1550 tons net

(1) [1901] P. 127.

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register, thirty-eight hands and a pilot, from Antwerp to Buenos Ayres, viâ London, with a general cargo, and two passengers, and a tug in attendance made fast ahead.

The *Ovingdean Grange* had sounded four short blasts on her whistle, and was, at the material time, turning in the river towards the north, with the tug towing on her starboard bow, preparatory to entering the West India Dock. In executing the manœuvre she gave three short blasts on her whistle and checked her headway by putting her engines full speed astern, but, from want of efficient look-out, went astern too long, and getting over (as the Court below found) towards the south shore, brought herself across the course of the *Forsete*, which vessel was unable to port and go under her stern owing to being hampered by a barge, with which the *Forsete* collided.

The *Forsete* had not complied with art. 47 of the Thames By-laws, by which "steam vessels navigating against the tide shall, before rounding . . . . Blackwall Point, wait until any other vessels rounding the point with the tide have passed clear."

The action was tried on February 12, 13, and 14, 1901. On February 15 the President (Sir F. H. Jeune) found the *Ovingdean Grange* to blame for negligently failing to execute the manœuvre of turning with due regard to the passing traffic; and, after referring to the case of *The Margaret* (*Cayzer* v. *Carron Co.*) (1), said: "In the present case, by not obeying this rule (art. 47), the *Forsete* brought herself into a position in which she would not otherwise have been—that is to say, she got herself into a place where the collision occurred, instead of being, at the time, a considerable distance above. That, however, is not enough to condemn her; but then comes the question: By her being there, did she hamper the course or manœuvres of the *Ovingdean Grange*? I think the *Ovingdean Grange* had a right to turn at the point she did, and the very object of rule 47 appears to me to be that the vessel coming up to the point to turn round shall have the river clear from the approach of vessels coming down. That object not having been attained in this case, it appears to me circumstances of

(1) 9 App. Cas. 873.

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difficulty arose, partly in connection with the *Ovingdean Grange* herself and partly in connection with the barge, which would not have arisen if the *Forsete* had obeyed the rule. Under those circumstances, it appears to me, and to the Elder Brethren, that the *Forsete* by what she did enhanced the difficulties of the situation in which the *Ovingdean Grange* was placed, and threw upon her the difficulty of taking more than ordinary care in doing what she did. Therefore, although the *Ovingdean Grange* was to blame for not exercising more care than she did, I cannot say that there was not placed upon her a greater difficulty than there should have been placed upon her by reason of the *Forsete* coming improperly into the position she did. It was not due entirely to the *Ovingdean Grange*, because no doubt the barge hampered the *Forsete*; but then the *Forsete* ought not to have been in that place, and by coming there she found herself hampered by the barge, for which she should have waited, and which would have passed her had she obeyed the rule, and the *Ovingdean Grange* found herself confronted by difficulty to which she would not have been exposed had the *Forsete* not been in that place hampered by the barge. For that state of things the *Forsete* is responsible, having broken the rule; and, therefore, the conclusion to which I have come is that the *Forsete* and the *Ovingdean Grange* are both to blame for this collision."

On appeal:—

June 17. *Pickford, K.C.*, *Aspinall, K.C.*, and *Stubbs*, for the appellants (plaintiffs), the owners of the *Forsete*. As there is no appeal by the owners of the *Ovingdean Grange*, the only question is whether the learned judge in the Court below was right in finding contributory negligence on the part of the *Forsete*. It is submitted that the decision of the House of Lords in *The Margaret* (*Cayzer* v. *Carron Co.*) (1) governs this case, and that the *Ovingdean Grange* should be held in this case, as the *Margaret* was in that case, alone to blame. In *The Margaret* (1) the question arose on the breach of art. 23 of

(1) 9 App. Cas. 873.

the Thames By-laws, for which art. 47 is now substituted. These rules are practically identical, and, having no statutory force, a vessel committing a breach is not, under s. 419 of the Merchant Shipping Act, 1894, to be deemed to be in fault, for, in the words of Lord Watson (1), "in the case of a rule like this mere disobedience is not enough; it must be shewn that it constituted fault in this sense, that it was actively contributing to the collision"; and the governing principle is applied by the same learned judge on the next page to the particular case as follows (2): "assuming that there was a breach of the rule and culpable neglect at the time, yet the consequences of that neglect could have been avoided by ordinary care on the part of the *Margaret*"—that is to say, the transgression of the rule by the other vessel was not the cause of the collision; for ordinary care on the part of the *Margaret* would have enabled her to avoid it, and therefore she was alone to blame.

In the present case those in charge of the *Ovingdean Grange* negligently allowed their vessel to get too far over to the south shore, the result being that the *Forsete* hampered the *Ovingdean Grange*, not because the *Forsete* had broken the rule, but because by an improper manœuvre on the part of the *Ovingdean Grange* that vessel was on the wrong side of the river. If those in charge of the *Ovingdean Grange* had exercised ordinary care the collision would have been avoided: *Davies* v. *Mann*. (3) Under such circumstances it is not material that those in charge of the *Forsete* broke the rule.

[The case of *H.M.S. Sans Pareil* (4) was referred to on the question of the application of the common law doctrine of contributory negligence to cases of collision between ships.]

Laing, K.C., and *Dawson Miller*, for the respondents (defendants), the owners of the *Ovingdean Grange*. There was ample evidence upon which the learned judge in the Court below could find that the neglect by the *Forsete* of the rule as to waiting placed the *Ovingdean Grange* in a difficulty, so that the latter vessel could not, by ordinary care, have avoided the collision—that is to say, it was proved that the *Forsete* being

(1) 9 App. Cas. at p. 886.
(2) 9 App. Cas. at p. 887.
(3) (1842) 10 M. & W. 546.
(4) [1900] P. 267, at p. 283.

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where she was hampered by the barge threw upon the *Ovingdean Grange* the necessity of exercising more than ordinary care. That is sufficient to distinguish this case from that of *The Margaret* (1), and to render the *Forsete* liable for contributory negligence.

Pickford, K.C., in reply.

June 18. COLLINS M.R. This is an appeal by the owners of the steamship *Forsete* against a decision of the learned President, who has found that the *Ovingdean Grange*, which is the other vessel in the collision, was to blame, in that she did not keep sufficient look-out; but he has also found that the *Forsete* is to blame, in this respect—that the *Forsete* had violated a rule, and that, had she regarded it, she would not have been in the place where the collision actually occurred; and he has found as a fact, that, being in the place where she was, and having regard to the other circumstances, namely, the presence of barges, she hampered the *Ovingdean Grange* in carrying out the manœuvre she was engaged in, and, therefore, placed on the *Ovingdean Grange*, in order to avoid a collision, the obligation of taking more than ordinary care, which is a greater obligation than that which can be insisted upon by the owners of the *Forsete*.

The circumstances are these. The *Ovingdean Grange* was coming up the river and was about to go into the West India Dock, and when she got opposite Blackwall Point she found it necessary to turn round. She had a steamtug in attendance to assist her in the operation of turning round and going into the dock. The *Forsete* was coming down the river against the tide, and by art. 47 of the Thames By-laws it is provided that: "Steam vessels navigating against the tide shall, before rounding Blackwall Point, wait until any other vessels rounding the point with the tide have passed clear." The *Forsete* saw the *Ovingdean Grange*, and the *Forsete* slowed, it is true, but as a matter of fact she continued upon her course and brought herself into the position at which the collision ultimately took place.

(1) 9 App. Cas. 873.

The learned judge has found that in not having waited within the meaning of that rule the *Forsete* did wrong; and that she did not wait, in the sense of waiting until the manœuvre which the other vessel was carrying out was over, is clear from the facts proved. It is clear she went on, and it seems to me, and the learned President has so found, that in going on she took the risk of hampering the manœuvre which the *Ovingdean Grange* was carrying out. The President has found that the *Ovingdean Grange*, in carrying out this manœuvre, was guilty of negligence and did not keep sufficient look-out, but he does not find, and it is not contended, that there was any element of negligence—that is to say, that she was wrong in turning at that place. He does not find that she came more than midway over towards the southern side. She was being assisted by the tug, and is a large vessel, and obviously it would not be just, with any particular degree of nicety, to decide what particular area she was entitled to cover. Therefore, it is not suggested that there was any negligence either in the place or manner in which she carried out this manœuvre; but the President has found that she did not keep sufficient look-out, and he visited that upon her. If the *Forsete* had not contributed, in the sense of negligence on her part, to the collision, then the *Forsete* would clearly have been free from blame. But the collision took place, and the *Forsete* claimed damages against a vessel which the President has found to have been negligent. Then comes the question, What about the position of the *Forsete* herself? She broke the rule, but though she broke it, that in itself, as he properly says, does not alter the position of the *Forsete*—not in itself alone—but it is a factor in determining whether what the *Forsete* did formed part of the negligence which brought about the collision. It is clear, on the President's finding, that the *Forsete* ought not to have been where she was at the time of the collision. That, again, is not enough, but he goes on to find that the *Forsete* was there, coupled with the fact that a couple of barges were there also—all these things together complicated the manœuvre which the *Ovingdean Grange* was carrying out in such a way that she was hampered by the wrongful act of the *Forsete*. The *Forsete* was

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wrong in being there, and the fact of her being there, with the fact that the barges were interfering with her when she was there, made it difficult for her to avoid the consequences of her own wrong-doing. She ought to have waited, and by not waiting she found herself in the presence of this manœuvre, and was then hampered by the presence of the barges. In those circumstances the President has found that the wrongful act of the *Forsete* did in fact contribute to the difficulty of the *Ovingdean Grange*, and cast upon her a burden greater than in point of law she is bound to bear; that is to say, cast upon her the burden of using more than ordinary care to avoid collision with the *Forsete*; in other words, he finds that the *Ovingdean Grange* could not by ordinary care have avoided collision with the *Forsete*. If that be the fact it does not matter that the *Ovingdean Grange* was negligent, because had she been diligent, had she used ordinary care, the collision would nevertheless have occurred.

It is not disputed, I think, that the President has directed himself according to law. It seems to me, certainly, that he has directed himself exactly in accordance with law. I do not think it is material on this part of the discussion to consider whether or not the burden is thrown upon the *Forsete* of shewing that her negligence did not contribute to the collision. In any case we have got past that stage of the burden of proof. We are now dealing with all the facts proved before us, and, whichever side the burden of proof is upon, that question is now gone. We have all the evidence before us, and our assessors are clear that the actual circumstance of the *Forsete* having got to the position she was in at the time the *Ovingdean Grange* was carrying out this manœuvre, did hamper the *Ovingdean Grange* and require from her a higher degree of care than ordinary. It has been argued that there was not evidence upon which the President could have found what he did find. It seems to me that that really is based upon a conclusion which the learned President does not seem to have drawn. He does find that the *Ovingdean Grange* was well over towards the southern side, but that is quite compatible with her not being nearly so far over as is suggested by the

Forsete. Therefore it seems to me that if you take, as he seems to have taken, rather a middle view between the two conflicting views of fact as to which side of the river this collision took place on, there is no inference to be drawn that there was that degree of negligence on the part of the *Ovingdean Grange* which would have made it impossible under any circumstances for the *Forsete* to have avoided a collision. It seems to me that on the President's finding of fact—I think there was abundant evidence for it—there was only such a degree of negligence on the part of the *Ovingdean Grange* as to admit of the *Forsete*, if she had exercised due care—and in that I embrace obeyed the rule laid down—herself avoiding the mischief. It was her own action which put her into such a position, and the *Ovingdean Grange* could not avoid the collision. I think the learned President has arrived at that conclusion without any misdirection in point of law.

MATHEW L.J. I am of the same opinion. When the *Forsete* saw the *Ovingdean Grange*, what ought the *Forsete* to have done? It is suggested that she should have waited and seen what the *Ovingdean Grange* would do. She did not wait, and she probably calculated she could port in time and go under the stern of the *Ovingdean Grange*; but she found herself hampered by barges, and, not being able to port, the collision occurred.

It is manifest that it was the duty of the *Forsete* to obey the directions given in the rule. On the evidence of the pilot the vessel was unable to extricate herself from a position where she should not have been, and therefore the collision came about. In his judgment the learned President says: "Therefore, although the *Ovingdean Grange* was to blame for not exercising more care than she did, I cannot say that there was not placed upon her a greater difficulty than there should have been placed upon her by reason of the *Forsete* coming improperly into the position she did. It was not due entirely to the *Ovingdean Grange*, because no doubt the barge hampered the *Forsete*; but then the *Forsete* ought not to have been in that place, and by coming there she found herself hampered by the barge, for

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which she should have waited, and which would have passed her had she obeyed the rule, and the *Ovingdean Grange* found herself confronted by difficulty to which she would not have been exposed had the *Forsete* not been in that place hampered by the barge." There is abundant evidence to support the view taken by the learned judge in the Court below.

COZENS-HARDY L.J. concurred.

Appeal dismissed.

Solicitors for appellants (plaintiffs), the owners of the *Forsete*: *Thomas Cooper & Co.*

Solicitors for respondents (defendants), the owners of the *Ovingdean Grange*: *William A. Crump & Son.*

T. L. M.

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March 25; *April* 10; *June* 9, 19.

THE CAYO BONITO.

Admiralty—Collision—Compulsory Pilotage—Exemption—London District—"Constant Trader"—Pilotage Act, 1825 (6 *Geo.* 4, *c.* 125), *s.* 59—*Order in Council, February* 18, 1854—*Merchant Shipping Act*, 1894 (57 *&* 58 *Vict. c.* 60), *s.* 603.

A British steamship company ran two lines, one from London to Antwerp and then on to America and back, the other from London to New Orleans direct, with liberty to call at Bermuda, and their vessels were employed on either line according to convenience. A new vessel belonging to the company had made one voyage from London viâ Antwerp to Mexican ports, and was proceeding in charge of a duly licensed Trinity House pilot, and carrying one passenger, on a second voyage for the same round, when she came into collision with the plaintiffs' vessel in the estuary of the Thames. The pilot of the vessel of the defendant company was found alone to blame:—

Held, by Gorell Barnes J., that the defendants were liable as their vessel was exempt from compulsory pilotage, being a "constant trader" between London and ports on the Continent north of Brest, within the meaning of the exemption in s. 59 of 6 Geo. 4, c. 125, supplemented by the Order in Council, February 18, 1854, and kept alive by s. 603 of the Merchant Shipping Act, 1894.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of the *British Prince;* the defendants were the owners of the *Cayo Bonito.*

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The case is reported on the question of the meaning to be attached to the words "constant trader" in the statutory exemptions from compulsory pilotage in the London district.

The facts were shortly as follows:—

On the night of February 8, 1902, the *British Prince*—a steam vessel of 7326 tons gross register, from New York to London and Antwerp with a general cargo, cattle and horses, a crew of fifty-eight hands, twenty cattlemen, and a duly licensed Trinity House pilot—was in the Duke of Edinburgh Channel in the estuary of the river Thames, near the Black Deep Lightship, when she came into collision with the *Cayo Bonito*, a screw steam vessel belonging to the port of London of 3427 tons gross register from London to Coatzocoalcas, in Mexico, viâ Antwerp, Havanna, and Vera Cruz, with a part cargo of 800 tons, one passenger, thirty-two hands, and a duly licensed Trinity House pilot. Both vessels sustained considerable damage.

By their defence to the action brought by the owners of the *British Prince*, the owners of the *Cayo Bonito* pleaded in the alternative that, "if the said collision was caused or contributed to by any of those on board the *Cayo Bonito*, which they deny, it was solely caused or contributed to by the neglect or default of a qualified pilot who was then in charge of the *Cayo Bonito*, and whose employment by the defendants was compulsory by law, and for whose acts, neglects, or defaults the defendants were not liable."

At the trial of the action on March 25 before Gorell Barnes J., assisted by two of the Elder Brethren of the Trinity House, the pilot of the *Cayo Bonito* was found alone to blame for the collision, the question of law whether the pilotage was compulsory being reserved, and, on April 10, argued by—

Laing, *K.C.*, and *Balloch*, for the defendants, the owners of the *Cayo Bonito*.

Aspinall, *K.C.*, and *Dawson Miller*, for the plaintiffs, the owners of the *British Prince*.

On June 9 further evidence was taken as to the nature of the voyages of the *Cayo Bonito*. The facts as to those

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voyages, and the arguments of counsel, fully appear from the judgment.

[In addition to the statutes, Orders in Council, and cases mentioned in the judgment, the following were referred to: *The Agricola* (1); *The Lloyds or Sea Queen* (2); *The Sutherland* (3); *The Columbus* (4); the charter granted to the Trinity Corporation by King James II., the material portions of which are set out in *The Hankow* (5); The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 578, 581, 583.]

Cur. adv. vult.

June 19. GORELL BARNES J. The *Cayo Bonito* is a large vessel belonging to the port of London, of 3427 tons gross register, and at the time of the collision between her and the *British Prince* she was on a voyage from London to Antwerp, and then from Antwerp to Coatzacoalcos, in Mexico. She had some cargo on board and one passenger, and it was in the course of the passage from London to Antwerp that the collision took place near the Black Deep Lightship in the estuary of the Thames, for which I have already held that the pilot of the *Cayo Bonito* was alone to blame.

The plaintiffs contend that the employment of the pilot was not compulsory by law, but the defendants allege that it was compulsory, and that, therefore, they ought to be released from liability in this case. The question is one of considerable difficulty, and the difficulty arises from the present unsatisfactory state of the legislation which affects the question of pilotage and the exemptions from pilotage in the Thames and its estuary. On examining the Acts it is difficult to come to any satisfactory conclusion upon them, and, although I have looked through them as carefully as I can, I feel that in the decision which I am about to give I cannot say that I have arrived at a conclusion with any confidence.

There are two questions: one entirely a question of law,

(1) (1843) 2 Wm. Rob. 10.
(2) (1863) Br. & L. 359.
(3) (1887) 12 P. D. 154.
(4) (1899) 8 Asp. M. L. C. 488.
(5) (1879) 4 P. D. 197, at p. 198.

and the other either a simple question of fact, or possibly a question of mixed law and fact. The legal question is what is the true meaning of the Order in Council upon which the case turns, and, when a meaning has been placed upon that order, the second question is whether, having regard to the circumstances of her trading, this vessel is to be treated as falling within the exemption for which that order provides.

Now, pilotage in this locality is compulsory under s. 622 of the Merchant Shipping Act, 1894, which provides that, "subject to any alterations to be made by the Trinity House and the exemptions under this part of this Act, pilotage shall be compulsory within the London district and the Trinity House outport districts," and, therefore, unless the exemptions there referred to apply to this ship, pilotage would be compulsory upon her. The material exemption upon which the plaintiffs rely is an exemption in the Order in Council of 1854, for this vessel having a passenger on board, the provisions of s. 625 of the Merchant Shipping Act, 1894, do not apply, the exemptions in that section only applying when the ship is not carrying passengers; but there are two sub-clauses to that section which have a bearing upon this case, because of a construction placed upon the word "trading" which occurs in them.

The exemptions conferred by s. 625 not being applicable, the plaintiffs have to rely upon exemptions in the Order in Council; and it is to be noticed that the exemptions in the Order in Council were held in the case of *The Earl of Auckland* (1) to have been preserved by the Merchant Shipping Act, 1854; and so it was conceded that they were preserved by the Merchant Shipping Act, 1894, in the same way as they had been preserved by the Act of 1854. The 603rd section of the Act of 1894 is the section which is relied upon as still continuing those exemptions, and the Order in Council containing the exemption in question was made on February 18, 1854. It is shortly but sufficiently stated for my purpose at p. 167 of Lushington's Reports. The words are:—

"The masters of the undermentioned ships and vessels shall, subject to the provision contained in the 59th section of the

(1) (1861) Lush. 164, 387.

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Act of Parliament, 6 Geo. 4, c. 125, in respect of the employment of unlicensed persons, be exempted from compulsory pilotage, viz.: Of ships and vessels trading to Norway, or to the Cattegat or Baltic, or round the North Cape, or into the White Sea, when coming up by the south channels; of ships and vessels trading to ports between Boulogne (inclusive) and the Baltic on their outward passages, and when coming up by the south passages."

The plaintiffs say that this exemption applies in this case, and that the words "ships and vessels trading" practically mean the same as ships and vessels on a voyage from the port of London to a port or ports between the ports on the Continent, mentioned in that clause; while the defendants' contention is that the words "ships and vessels trading" mean "constant traders," because they contend that that Order in Council must be read with s. 59 of 6 Geo. 4, c. 125. In reply to that contention the plaintiffs make a further point, by saying that even if it is to be construed as referring to "constant traders" this vessel was, within the true meaning of such words, a constant trader from London to Antwerp (which is included in the area mentioned), and was so trading at this time.

The legislation on this subject is somewhat voluminous, and the Acts require careful consideration, it being necessary to bear in mind that at one time there were two bodies connected with the pilotage of the Thames, namely, the Trinity House pilots and the Cinque Ports pilots; the latter being engaged in piloting vessels coming from the westward to the Thames and Kentish ports. The first Act to refer to is 5 Geo. 2, c. 20, passed in 1732, which dealt with the Trinity House pilots, and contained in the 1st section a proviso that "nothing in this Act contained shall extend or be construed to extend to the obliging of any master or owner of any ship in the coal trade, or other coasting trade, to employ or make use of any pilot." Next comes the Act of 1808 (48 Geo. 3, c. 104). By s. 2 (stating its terms briefly from the marginal note) it is provided that: "From October 1, 1808, the Corporation of Trinity House of Deptford shall license fit persons as pilots to conduct

all vessels within certain limits, and none others shall act, except as herein stated." There is also an examination of pilots provided for by the Society or Fellowship of Pilots of Dover, Deal, and the Isle of Thanet, commonly called Cinque Port pilots, "so far as such pilots are hereby authorized to pilot ships and vessels from the westward up to London Bridge, and from London Bridge downwards to the westward —that is to say, from any port or place between the Isle of Wight and the said bridge . . . . and also save and except as well all colliers as also all ships and vessels trading to Norway and to the Cattegat and Baltic, and likewise round the North Cape and into the White Sea."

I come now to the clause which seems the origin of the exemption which I have to consider: "Save and except all constant traders inwards from the ports between Boulogne inclusive, and the Baltic, such ships and vessels having British registers, and coming up or going down the North Channel by Orfordness, but not otherwise; and likewise save and except all coasting vessels and all Irish traders using the navigation of the river Thames as coasters." It is to be observed that the exemption is of "constant traders inwards," from ports mentioned, such vessels having British registers and coming up or going down the North Channel, and my impression is, from an examination of the Acts, that the words "going down" were erroneously introduced—that the intention at that time was to exonerate ships coming inwards from the ports mentioned, to London, having British registers, and in that way, for reasons, which are mentioned in various reports to Parliament, to favour British ships coming inwards, as against foreigners coming inwards. That Act was only to be in force for four years; and the subject was again dealt with by the Legislature in 1812 by the 52 Geo. 3, c. 39. By s. 2 it is again provided that the Corporation of the Trinity House shall license fit persons as pilots within certain limits, and those limits were for "all ships and vessels sailing, navigating, and passing up and down or upon the rivers of Thames and Medway," &c. Then there were powers given to the Lord Warden of the Cinque Ports to license pilots for "ships and

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vessels sailing, navigating, and passing from the westward up the rivers Thames and Medway—that is to say, from Dungeness up to London Bridge and Rochester Bridge, and from the Buoy of the Brake to the westward—that is to say, from the said buoy to the west end of the Owers." Then came this exemption: "Save and except as well all colliers as also all ships and vessels trading to Norway and to the Cattegat and Baltic, and likewise round the North Cape, and into the White Sea; and save and except all constant traders inwards from the ports between Boulogne inclusive and the Baltic, such ships and vessels having British registers, and coming up the North Channel by Orfordness, but not otherwise; and likewise save and except all coasting vessels and all Irish traders using the navigation of the river Thames as coasters." That, so far as is material, is practically the same as the temporary Act I have referred to, except that the words "going down" are omitted in the permanent Act. In 1824 there was a report of a Committee in Parliament on the subject of these Acts which made certain recommendations; but as far as I can make out the recommendations were not fully carried out.

The next Act which dealt with the subject is the Pilotage Act of 1825, referred to in the Order in Council, namely, 6 Geo. 4, c. 125. Sect. 59 contains the following exemptions: "Notwithstanding anything in this Act contained, the master of any collier, or of any ship or vessel trading to Norway, or to the Cattegat or Baltic, or round the North Cape, or into the White Sea, on their inward or outward voyages, or of any constant trader inwards, from the ports between Boulogne inclusive and the Baltic (all such ships and vessels having British registers and coming up either by the North Channel, but not otherwise), or of any Irish trader using the navigation of the river Thames and Medway, or of any ship or vessel employed in the regular coasting trade of the kingdom, or of any ship or vessel wholly laden with stone from Guernsey, Jersey, Alderney, Sark or Man, and being the production thereof, or of any ship or vessel not exceeding the burthen of sixty tons, and having a British register, except as hereinafter provided."

The word "either" appears to me to be a mistake. The section otherwise is very much the same as the Act of 1812, providing for the freedom from pilotage of "constant traders" inwards from ports north of Boulogne coming up by the North Channel.

In 1853 came the 16 & 17 Vict. c. 129, which amalgamated the Trinity House pilots and the Cinque Ports pilots, and by s. 21 power is given for every pilotage authority by regulation followed by Order in Council to do certain things, including the power "to exempt the masters of any ships or vessels, or of any classes of ships or vessels, from being compelled to employ pilots, and to annex any terms or conditions to such exemptions, and from time to time to revoke and alter any exemptions so made, and to revise and extend any exemptions now existing . . . . upon such terms and conditions and in such manner as such authority, with such consent as aforesaid, may think fit." In pursuance of that section the Order in Council of February, 1854, to which I have already referred, was made.

In that state of the legislation, two cases require to be mentioned. The first is *Reg.* v. *Stanton* (1), which, according to the side-note, decided that "the exemption given by statute 6 Geo. 4, c. 125, s. 59, from the necessity of employing licensed pilots, to masters piloting their own ships on the voyages there specified, without the aid of an unlicensed pilot, is continued by the Merchant Shipping Act, 1854, s. 353, and this exemption applies as well to ships carrying as to ships not carrying passengers, and is not affected by the exemption given in s. 379 of the same Act to ships on particular voyages not carrying passengers." That was the case of a regular trader to the Baltic, which had passengers.

The next case to refer to is that of *The Earl of Auckland* (2), which was the case of a vessel ordinarily occupied in carrying goods and passengers between London and Rotterdam, and having passengers on board. This case decided, in the same way as *Reg.* v. *Stanton* (1), that the exemptions from compulsory pilotage given by 6 Geo. 4, c. 125, s. 59, supplemented by

(1) (1857) 8 E. & B. 445. (2) Lush. 164, 387.

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the Order in Council of 1854, were maintained by the Merchant Shipping Act, 1854. Then, as I have already mentioned, the Act of 1894 kept these exemptions alive, and therefore, if they are applicable to the present case, those cases shew that those exemptions are to be treated as still existing, and those decisions are binding on me.

In addition to the exemptions I have already referred to, there were in s. 379 of the Merchant Shipping Act, 1854, exemptions of ships, when not carrying passengers, in the London district and in the Trinity House outport districts, amongst others (sub-s. 3): "of ships trading to Boulogne or to any place in Europe north of Boulogne." That exemption was somewhat modified by an Order in Council of December 21, 1871, which had practically the effect of extending the coast line, if I may so express it, from Boulogne to Brest, making therefore an exemption of vessels, not carrying passengers, trading from London to any port between Brest and any place in the north of Europe. These exemptions, although the words were "trading to," were held in *The Wesley* (1) to apply to vessels both ways—that is, going outwards or coming in, though there seems some doubt whether, upon the language of the exemptions, that was correct. This class of exemption was further provided for by s. 625 of the Merchant Shipping Act, 1894, to which I have already referred, and under which: "The following ships, when not carrying passengers, shall without prejudice to any general exemption under this part of this Act, be exempted from compulsory pilotage in the London district and in the Trinity House outport districts—that is to say (amongst others)—sub-s. 3—Ships trading from any port in Great Britain within the London district or any of the Trinity House outport districts to the port of Brest in France, or any port in Europe north and east of Brest, or to the Channel Islands or Isle of Man; (sub-s. 4) ships trading from the port of Brest or any port in Europe north and east of Brest, or from the Channel Islands or Isle of Man to any port in Great Britain within the said London or Trinity House outport districts."

(1) (1861) Lush. 268.

Those clauses clearly provide for the inward and outward trading of the class of vessels referred to, when not carrying passengers; but they are not applicable to the present case, because the ship was carrying a passenger, and they are only material because of the use of the words "ships trading," upon which words there are decisions which counsel for the plaintiffs contend conclude this case.

The first of those decisions is *Courtney* v. *Cole*. (1) In that case "a British ship was one of a line of vessels making regular voyages from London to Japan and ports in the East, and back to London, and thence to ports in Europe north of Boulogne and back to London. On a return voyage from the East she went, as usual, to London. She there discharged part of her cargo and her crew, and then, with the bulk of the cargo and a crew of runners, but without passengers, proceeded to Holland. Held, that she was a ship 'trading to' a place north of Boulogne, and therefore exempted from compulsory pilotage in the London district."

Lord Coleridge and the late Master of the Rolls (then A. L. Smith J.) decided the case upon the construction placed by them upon s. 379 of the Act of 1854, and they held that the vessel was, within the meaning of the words of the section, a ship which was trading to a place north of Boulogne. The judgment of A. L. Smith J. contained this passage (2): "This being so, in my judgment the words in sub-s. 3 are not to be read as meaning the constant trading to Boulogne or any place in Europe north of Boulogne, but as meaning what they say, i.e., when a ship in fact is trading to Boulogne or north thereof, and, I would add, from (and possibly to) the London district and the Trinity House outport districts, she is exempt. The argument addressed by the pilots, that in s. 59 of 6 Geo. 4, c. 125, the word 'constant' is used, and that by s. 353 of the Act of 1854 compulsory pilotage was to be enforced as theretofore, in my judgment avails nothing in the face of the fact that the word 'constant' is expressly omitted in the later section, viz., 379. I would add that, should I be wrong in the interpretation I put upon

(1) (1887) 19 Q. B. D. 447. (2) 19 Q. B. D. at p. 457.

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the words of s. 379, sub-s. 3, the findings in the case, especially those in paragraphs 5 and 9, shew that the *Cardiganshire* was a constant trader from London to Amsterdam and back; for it seems to me impossible to hold that the words of the sub-section mean *only* trading to Boulogne and north thereof, which must be the pilots' contention if they are correct upon their interpretation of the sub-section as applied to the facts of this case."

That case, therefore, decided that when a ship not carrying passengers was in fact trading from London to Europe north of Boulogne she was within the exemption of s. 379 of the Act of 1854, and that that was so although that was not her only trade. It is to be noticed in that case that the ship was a trader to Japan and the East and made the passage from London to Amsterdam and Hamburg and back as part of that trading. That case was followed by *The Rutland* (1), where a ship was laden with cargo, from the river Plate to Rotterdam, with cattle for London. She had discharged the cattle in London and was proceeding with the cargo to Rotterdam, and it was held that whilst the ship was proceeding from London to Rotterdam she was, although she took in no cargo in London, "trading" from London to Rotterdam within the meaning of the section, and was, therefore, exempt from compulsory pilotage in the London district. She had no passengers, and the question was whether at that time s. 625 of the Act of 1894, sub-s. 3, was applicable. The view which I understand the House of Lords took in that case may be gathered from one short sentence in the judgment of the Lord Chancellor, at p. 335, where he said: "For my own part I cannot adopt the view that you are entitled to change the participle into an adjective, and I do not think it would carry us to a right conclusion if you did. A 'vessel trading' points to the particular act of trading, which is the matter that was in the mind of the Legislature." Lord Watson said (2): "I can find nothing in the Act of 1894 which requires that the words of sub-s. 3 shall be construed in any other than what I venture to term their ordinary and natural import; and,

(1) [1897] A. C. 333. (2) [1897] A. C. at p. 336.

when so construed, I think they include every ship which has left the port of London and is on her way to Brest, or to any of the other ports which are named in the statute, in pursuit of a commercial adventure."

Counsel for the plaintiffs argued that those two cases were applicable to the present case, and that it was sufficient to bring a ship within the exemption contained in the Order in Council, if she were on the particular occasion trading from London to a port within the limits of the coast line referred to; and that in substance the words "ships and vessels trading" should be construed in the Order in Council practically in the same way as they were construed in s. 379 of the Merchant Shipping Act, 1854, and s. 625 of the Act of 1894. It seems to me, however, that there is a considerable difference between the considerations applicable to the one set of exemptions and the other. Possibly there is more difficulty in distinguishing the exemptions in the Order in Council and the exemptions in the Act of 1854, s. 379; but there is not so much difficulty in differentiating between the Order in Council and the exemptions in the Act of 1894, s. 625, because the language of sub-ss. 3 and 4 seems to point to a particular act of trading rather than to a description of the vessel which is engaged in the trading. I do not consider that the question before me is determined by the two decisions to which I have referred, and I think it is necessary to consider what is the true meaning of the Order in Council which is relied upon by the plaintiffs. For this purpose I must refer to the decision in *The Vesta* (1) that "ships and vessels" in the Order in Council mean British ships, and that the reason for so treating the Order in Council is that it ought to be read with 6 Geo. 4, c. 125, s. 59, which provides that the "ships and vessels" referred to are to have British registers, and, therefore, as the Order in Council extends the exemptions existing under the 6 Geo. 4, c. 125, the words "ships and vessels" are not to be read as referring to all ships and vessels, but to ships and vessels having British registers; so that the Order in Council is not to be read literally. Sir R. Phillimore,

(1) (1882) 7 P. D. 240.

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in giving judgment, said: "I am of opinion that this absurdity does not arise, and that the exceptions in this Order in Council do not apply to foreign vessels, but that the words 'ships and vessels,' when used in the portion of the Order in Council I have read, must mean British ships and vessels, which alone are dealt with by the material portions of s. 59 of 6 Geo. 4, c. 125, to which section the Order in Council in question, so far as it relates to exemptions, is subsidiary, and of which it is explanatory. I think, moreover, that this was the opinion to which Dr. Lushington inclined in the cases of *The Earl of Auckland* (1) and of *The Hanna*." (2)

If the Order in Council is to be read in the way that Sir R. Phillimore read it—not literally, but as subsidiary to s. 59 of 6 Geo. 4—it becomes necessary to see what is meant by the words "ships and vessels trading." In s. 59 the words are used in respect "of any ship or vessel trading" to Norway or to the Cattegat or Baltic, on inward or outward voyages, and I think that "ship or vessel trading" is there descriptive of the employment of the vessel, and not merely of the particular voyage with which she is for the moment concerned. Then, again, the words "any constant trader" cannot, I think, refer to one particular occasion on which a vessel is proceeding, but to a description of the employment of the vessel; and so, also, Irish trader refers to ships or vessels employed in trading to Ireland, and then there is the reference to any ship or vessel employed in the regular coasting trade of the kingdom. The other provisions may be read as applicable to a particular occasion; but there we have not got the words "ship or vessel trading," and, therefore, I think it seems probable that when the words "ships and vessels trading" were used in the Order in Council, especially having regard to the words "to ports between Boulogne and the Baltic on their outward passages, and when coming up by the south passages," the words were used as descriptive of a class of vessel, and not simply of the particular voyage upon which the vessel happened to be engaged at the moment. I may observe that the exemption in respect of "vessels on voyages between any port in Sweden

(1) Lush. 164. (2) (1866) L. R. 1 A. & E. 283.

or Norway and the port of London" was abolished by 60 & 61 Vict. c. 61, but that does not affect the remaining part of s. 59, or of the Order in Council.

Having regard to these considerations, the inference which I draw from the use of the words in the Order in Council is that it refers to a description of vessels which, speaking in general terms, may be described as engaged in the trade between London and the Continental ports included in the coast area.

The question then comes to be, whether this vessel was so engaged. That is the second question in the case, and it is necessary to see what the facts are. The *Cayo Bonito* belonged to the Cuban Steamship Company, which had several other vessels, and evidence has been given as to the nature of the employment of these vessels and other ships which, I think, they charter from time to time. Substantially it comes to this, that the vessels were worked in two lines. The prospectus of the company was put in, and that described the company as having been formed under the above title for the purpose of developing and conducting on a more extensive scale a line of steamers between London, Antwerp, and Cuba. Then shipping lists were put in of the ships and their advertised times of sailing. There is one of February of this year which is headed, "The Cuban line of steamers, London and Antwerp to Havanna, Tampico, Vera Cruz, and Coatzocoalcas, taking cargo through to Mexico city, Puebla, and other inland places in Mexico, and calling at other ports in Cuba should sufficient inducement offer"; and I find the "fine screw steamship *Cayo Bonito*" is mentioned. Then there is a description of the Cuban line of steamers from London to New Orleans direct. The *Cayo Bonito* is also put down as one of the steamers serving in that line. The first shipping notice, to which I have referred, was just before the collision, and the second was issued shortly afterwards. There is the same general description of the lines; but the *Cayo Bonito*, although appearing in one of the two lines, is not mentioned as sailing at the moment, but another ship is put in instead. It, therefore, appears that this vessel, with others, was to be engaged in working two lines. One may be described as a line

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from London to Antwerp, and then on to America and back, and the other as a line from London to New Orleans direct, with liberty to call at Bermuda. So that there is a very difficult question of fact to determine. The *Cayo Bonito* had made one voyage previously to this accident, going from London to Antwerp, and then on to Mexico. On the voyage in question she was on the same round from London to Antwerp, and then on to Mexico, and I think I am right in stating that since the disaster she has made the voyage from London to Antwerp and on to Mexico, with part of the same cargo she had on board at the time of the collision. A schedule or statement of the working of the ships of the Cuban line has been handed in which could be referred to; but substantially it seems to me that she is a vessel belonging to a company which is employed, so to speak, in two lines, because although she has been, on the voyages she has made—I think she is a new ship—only on this round from London to Antwerp and then to America, she is advertised, and it was stated that she might be used, to go to Bermuda direct, and thus fulfil the service of both lines. Although I might analyze and examine the employment of the vessel more fully, I do not think I should come to any other statement of the position than that which I have done. Possibly I might add this, that it does not appear that the vessels going to Antwerp always go to Antwerp, but they appear to do so generally. That presents this matter for consideration. If the Order in Council is to refer, using a neutral term for a moment, to regular traders, is a ship so engaged a "constant" or regular trader between London and Antwerp, which is included in the coastal area?

I think that is an exceedingly difficult question to determine, because there may be two views taken. There may be the view that the word "constant" is used in the sense of a vessel doing nothing else but going backwards and forwards between London and the Continent, and here the use of the word "constant" is that which is used in mathematics, namely, an inflexible, unalterable quantity, as opposed to a fluctuating, variable quantity. The other view is that it is used in a business sense, of a vessel which is regularly engaged in the

particular trade, but not so absolutely going backwards and forwards that there is never any departure from the voyage between the Continent and London. The only light I can obtain upon this question appears to me to be that which is found in the judgment of A. L. Smith J. in *Courtney* v. *Cole* (1), where he says that, if it were necessary to find the vessel in *Courtney* v. *Cole* (1) was a constant trader, it was impossible to hold that the words of the sub-section of which he was speaking (sub-s. 3, s. 379, of the Act of 1854) meant only trading to Boulogne or any place in Europe north of Boulogne. His view certainly was that a vessel would still be a constant trader if part of her duty or business was to go from London to the Continent, though the remaining and larger and more substantial part was to go from this side of the Atlantic to ports in Japan and the East, and the voyage between London and Antwerp or Boulogne, or Hamburg or Amsterdam, whichever it might be, was a very small portion of that larger business in which the ship was engaged. So that the view which he took of a constant trader does not simply limit the ship to going backwards and forwards between the port of London and the Continent. Therefore, if this ship were absolutely regularly engaged, so that she never did anything except go between London and Antwerp and then on to America, she would be, within the language which the late Master of the Rolls used, a constant trader, although she did not only go backwards and forwards between London and the Continent. That leaves a further question. Does the word "trading" or the words "constant trader," which seem to mean substantially the same thing, allow any departure, from always going to a Continental port after leaving London, by being taken off the regular line, which includes calling at a Continental port, and going, on occasions, direct from this country to other than a Continental port? That is to say, do the words include, as I think, from the judgment above referred to, I ought to hold they do include, going one part of the journey or voyage which is not merely between the two sides of the English Channel? In other words, is a ship which

(1) 19 Q. B. D. 447.

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is to come within that definition of constant trader one which must never make any other voyage except that which would include going to a Continental port? I have thought about this matter a good deal, and I do not feel able, having regard to the general terms of the Act, to place such a strict meaning upon the words, because it seems to me that it would involve this remarkable result, that, if a ship which was habitually—so habitually as never to do anything else—engaged in going from London, we will say, to Antwerp and back, were for any particular voyage taken off and run to some other port—for instance, London to Bordeaux—for a voyage, and then put back on to her regular trade, it would destroy her constancy, so to speak; and the ship would never, although in an ordinary business sense regularly engaged in going backwards and forwards, dare to depart from it, for business purposes, for one voyage, for fear of destroying her constancy, and thus being taken out of the exemption of which otherwise she would avail herself.

It seems to me that the true result to arrive at is to regard the use of these terms from a business point of view, and that if it is part of the regular business of a ship to proceed from the port of London to the Continent, between the limits mentioned, she is, within the meaning of the Order in Council and the section, a "constant trader," and therefore exempt from the compulsion to take a pilot. That is the conclusion I have come to; and in the result I hold, therefore, that this vessel was as a matter of law and of fact within the exemption, and that her pilotage was not compulsory. That leaves the defendants responsible for the collision; and, therefore, there will be the ordinary decree that the *Cayo Bonito* is alone to blame.

Solicitors for plaintiffs, the owners of the *British Prince*: *Thomas Cooper & Co., for Hill, Dickinson, Dickinson, Hill & Roberts, Liverpool.*

Solicitors for defendants, the owners of the *Cayo Bonito*: *Hollams, Sons, Coward & Hawksley.*

T. L. M.

WIGLEY *v.* THE SOLICITOR TO THE TREASURY.

1902
July 4.

Administration Suit—Pedigree—Evidence.

The Court, in the absence of any official record, accepted, as sufficient primâ facie evidence of a marriage of the parents of an intestate, a statement contained in an extract from a Scottish marriage register of the year 1868 (the bridegroom being the intestate's brother), in which, under the heading "Name, surname, and rank or profession of father," appeared the names and description of both parents of the bridegroom.

ADMINISTRATION SUIT.

The plaintiff claimed, as a cousin-german and one of the next of kin of the intestate, Benjamin Cant, a grant of letters of administration in the deceased's estate.

The intestate, Benjamin Cant, late of 23, Haverstock Hill, in the county of London, cigar merchant, died on December 3, 1901, aged about seventy-three years.

The Solicitor to the Treasury had entered a caveat and put in a defence, denying that the plaintiff was a cousin-german or one of the next of kin, and alleging that the deceased died a widower and intestate and without next of kin.

At the hearing, it was stated by counsel for the defendant that the only point at issue was as to the marriage of the parents of the intestate.

No official record existed of that marriage or of the birth of the intestate.

Inderwick, K.C., and *Newson*, for the plaintiff.

G. S. Robertson (*H. Sutton* with him), for the defendant.

JEUNE P. I hold that the certificate of the marriage in Scotland of the brother of the intestate contains sufficient primâ facie evidence of the marriage of the parents; and, upon that, I give judgment for the plaintiff and grant letters of administration to him as a cousin-german once removed and one of the next of kin of the intestate. The costs of the

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King's Proctor may be paid out of the estate, but I do not think that there is at present any power to order costs in such a case as between solicitor and client.

Solicitors for plaintiff: *Samuel Price & Sons.*
Solicitor for defendant: *The Solicitor to the Treasury.*

H. D. G.

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July 18.

BRISCO *v.* BAILLIE HAMILTON AND OTHERS.

Probate—Will—Mistake—Inadvertence of Solicitor—Opportunity for Reading Over—Due Execution—Want of Knowledge and Approval—Words eliminated from Probate.

Where the solicitor who drew the will of the testatrix mistook the extent of her interest in certain landed estates, and the will was accordingly executed devising only her "undivided moiety of and in" the said estates, the Court, notwithstanding the fact that a draft of the will had been sent for her approval, and she had returned the said draft with certain alterations in other parts, found as a fact that she did not know and approve of the clause as drawn, and directed that the restrictive words should be eliminated from the probate.

SUIT for revocation of probate, and for a fresh grant omitting certain words.

The plaintiff, Sir Musgrave Horton Brisco, Bart., as a devisee and legatee named in the will dated March 17, 1873, with a codicil of February 9, 1899, of Sarah Brisco, deceased, late of Bohemia, near Hastings, and of 79, Portland Place, London, who died on January 20, 1901, claimed revocation of the probate granted in common form on February 25, 1901, to Sir William Alexander Baillie Hamilton, Sir Auchitel Piers Ashburnham Clement, Bart., and Sydney Edward Jones, the first three defendants now on the record.

The plaintiff alleged that the deceased did not know and approve of certain words contained in the will, the substance of the case being that the deceased gave no instructions for their insertion; that they were never read over or explained to her; and that, if they were read over by or to or were explained

to her, she did not understand their meaning, and was not aware of their nature and effect. The plaintiff, therefore, claimed probate of the will and codicil, but omitting from the will the words "undivided moiety of and in certain" in the nineteenth and twentieth lines of the first page thereof, and the words "under the will" in the second line of the fifth page thereof.

The three executors put in a defence stating that they did not admit the plaintiff's allegations, but submitted to the judgment of the Court with respect thereto; and, by way of counter-claim, they asked for probate in solemn form of the will and codicil as already proved; and, alternatively, probate of the will and codicil with such omissions from or alterations of the said will as to the Court might seem meet; and such further and other relief as might be just.

The remaining two defendants, Florence Arbuthnot (widow) and Robert John Wastel Arbuthnot, denied the plaintiff's allegations, and claimed sentence pronouncing for the true force and validity of the will and codicil without any omission.

The passage in the will in which the words sought to be omitted occurred was as follows: "I devise all that my undivided moiety of the estate known as the Coghurst estate, consisting of certain manors, farms, lands, and hereditaments in the parishes of Ore Greestling, Westfield, Hollington, and Icklesham, or some other parish or parishes near or adjoining thereto, in the county of Sussex, together with the mansion-house of Coghurst Hall, and my undivided moiety of an estate at or near Ripponden, in the West Riding of the county of York; and also all that my *undivided moiety of and in certain* manors, farms, lands, and hereditaments in the parish of Calcethorpe, Addlethorpe, Burgh, Walmsgate, Theddlethorpe, and Mablethorpe or adjoining parishes, in the county of Lincoln; and the advowson or right of presentation to the chapelry of Calcethorpe to the use of Sir Musgrave Horton Brisco, Baronet, of Crofton Hall, in the county of Cumberland, for his life without impeachment of waste, with remainder to the use of his son, Hylton Ralph Brisco, for his life without impeachment

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of waste, with remainder to the use of the first and every other son of the said Hylton Ralph Brisco successively . . . . in tail male. . . ."

It appeared that the Lincolnshire estates mentioned in the said devise, and which were of the gross annual value of about 1260*l.*, belonged entirely and absolutely to the testatrix, Sarah Brisco, as surviving joint tenant under the will of her father.

The proposed omission of the words "under the will," in the statement of claim, related to certain settled jewellery, as to which an agreement had been arrived at since the statement of claim was delivered.

The mistake now sought to be rectified appeared to have arisen from the solicitor, a Mr. Jones, who drew the will of Sarah Brisco, having inadvertently overlooked the fact that the said Sarah Brisco and her sister Eliza Brisco were, under the will of their father, joint tenants of those estates, and not tenants in common, as was the case with certain other estates owned by them.

A similar mistake in regard to a devise of certain other estates to Mrs. Arbuthnot was cured by a residuary devise to her. Therefore no question arose as to these, which were known as the Newtown Hall estates.

If the devise now in question were held to carry only a moiety of the Lincolnshire estates, or if the devise were held to carry no part thereof to the plaintiff and his family, the remaining moiety or the whole of those estates, as the case might be, would appear to pass under the residuary devise of real estate to Mrs. Arbuthnot (the fourth-named defendant) and her family.

It appeared from the evidence of Mr. Charles Edward Jones, the family solicitor, that the draft of the will, instructions for which were given in 1892, was sent to the testatrix in July of that year; that she retained it till March, 1893; and that she then took it to the solicitor with directions as to certain alterations which she desired. There was, however, no evidence that she had, in fact, ever read over, or had read over to her, either the draft or the will; and a letter from the solicitor to

the testatrix was put in, from which the contrary might be inferred.

Inderwick, K.C., and *Le Bas*, for the plaintiff.
Lindley, for the executors.
Priestley, for the other defendants.

JEUNE P. No doubt, if it can be proved that a will has been really brought to the mind of a testator or testatrix, and has been duly executed, it is difficult—perhaps impossible—in law to hold that anything contained in the will is a mistake. But, as was pointed out by the House of Lords in *Fulton* v. *Andrew* (1), the question is still left open whether the will was or was not really brought to the notice of the testator or testatrix. That question is a question of fact depending upon the circumstances of the particular case. In the present case I am satisfied that the particular portion of the will before me was not brought to the knowledge of the testatrix in such a way that she must be assumed to have confirmed it by her subsequent execution of the will. From the evidence before me, I have no doubt that a mistake was made by the insertion of the words now in question; and, although it is quite true that the draft was sent to the testatrix, it was accompanied by a letter from the solicitor which in effect stated that there had been no material departure from the terms of the sister's will, upon which it was modelled. Taking those facts, together with the language of the document itself, it is, to my mind, clearly shewn that the testatrix never intended to impose any limitation or restriction upon the particular bequest; and if a jury were asked the question they would decide without hesitation that the portion of the will in question was not approved by the testatrix. I therefore consider it my duty to hold that those words do not form part of the will of the testatrix. I revoke the original probate, and decree a fresh grant of probate with the omission of those words.

Lindley asked for the costs of the executors out of the estate.

(1) (1875) L. R. 7 H. L. 448.

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BRISCO v. BAILLIE HAMILTON.

The President.

Priestley also asked for the costs of Mrs. Arbuthnot out of the estate.

Inderwick, K.C., for the plaintiff. Some doubt has been expressed by this Court, and also by the Chancery Courts, as to whether costs of litigation could be given out of real estate; but s. 2 of the Land Transfer Act, 1897, appears to give the Court the necessary power. If the Court thinks fit, the plaintiff will consent to an order that the costs of the parties be paid out of the Lincolnshire estates.

THE PRESIDENT. I think that is quite reasonable, and I make the order accordingly.

Solicitors for plaintiff: *Royds & Rawstorne.*

Solicitors for executors and for other defendants: *Young, Jones & Co.*

H. D. G.

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June 11, 16.

IN THE GOODS OF SMART.

Probate—Republication of Will by Codicil—Reference in Will to future Document—Incorporation.

The testatrix, by a will made in 1895, gave to M. R. S., during her life for her own absolute use and benefit, all her furniture, books, plate, and personal effects, and, after the death of the said M. R. S., the testatrix directed that her trustees should give to such of her friends as she (the testatrix) might designate in a book or memorandum, to be found with her will, "the different articles specified for such friends in such book or memorandum. . . . ." The will also declared that M. R. S. was to have absolute power to dispose of any articles not specifically disposed of by the testatrix:—

Held, that as the "book or memorandum" was referred to in the will as a future document, the codicil, which confirmed the will, could thereby only be taken to speak of the book as a future document, even although it was in fact written before the date of the codicil:

Held, therefore, that the book was not incorporated and could not be included in the probate.

MOTION for probate of a will and codicil, incorporating a certain memorandum book purporting to contain bequests of specific articles. The opinion of the Court was sought at the desire of the beneficiaries.

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Bargrave Deane, K.C. (*Elgood* with him), for the executors. The cases seem to be equally divided. [*In the Goods of Hunt* (1), *In the Goods of Stewart* (2), *In the Goods of Lydia Mathias* (3) (decided later than *In the Goods of Stewart* (2), though reported before), *In the Goods of Lady Truro* (4), *In the Goods of Mary Reid* (5), and *Durham* v. *Northen* (6) were referred to.]

GORELL BARNES J. *In the Goods of Lydia Mathias* (3) is not opposed to *In the Goods of Stewart* (2), because, reading the will as re-executed at the date of the codicil, it in terms refers to a future document.

Cur. adv. vult.

GORELL BARNES J. This is a motion to obtain the opinion of the Court as to whether a certain book, or lists in it, is to be incorporated with the will and codicil of Miss Ann Caroline Smart. The lady made a will on February 28, 1895, which contains a clause as follows: "I give to my said cousin, Margaret Rose Smart, all my furniture, books, plate, linen, wearing apparel, and personal effects of a like nature during her life for her own absolute use and benefit, and from and after her decease I direct my trustees to give to such of my friends as I may designate in a book or memorandum that will be found with this will the different articles specified for such friends in such book or memorandum, and as regards any of such articles not specifically disposed of by me, I declare that the said Margaret Rose Smart shall have full power to absolutely dispose thereof." At the time when this will was made, as far as I can make out from the affidavit which has been filed, there was no such book as that mentioned in the will, or, if there was, it is not in existence; but, after the date of that will, there is a book which I understand, though it is not deposed to on affidavit at present, is in the handwriting of the lady, beginning "1898. Hints for Executors; amended 1899," and on the fourth page, I think it is, of the book there

(1) (1853) 2 Rob. 622.
(2) (1863) 3 Sw. & Tr. 192.
(3) (1863) 3 Sw. & Tr. 100.
(4) (1866) L. R. 1 P. & M. 201.
(5) (1868) 38 L. J. (P. & M.) 1.
(6) [1895] P. 66.

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commences a list with regard to clothing and other articles, and it is with regard to the articles mentioned in the book that the question really arises. After, at any rate, the date at which the book appears to have been written up, a codicil appears to have been made by the lady, dated July 27, 1900. I do not find that any reference is made to the book in any codicil; but the codicil before me deals with a considerable number of dispositions, and winds up by stating that in all other respects the testatrix confirms the said will. The question is, therefore, whether the book, so far as it is referred to, if referred to at all, in that clause which I read from the will, is to be incorporated with the will and codicil. I have already practically intimated my view that it ought not to be incorporated, and I might have contented myself with saying that I come to that conclusion in consequence, principally, of a decision of the President in the case of *Durham* v. *Northen* (1); but Mr. Deane argued that that case was inconsistent with other authorities, and that the authorities were in conflict amongst themselves; so I desired to look through them to see if that contention could be properly supported. Before referring very briefly to the cases, it seems to me desirable to state how the principle upon which this matter ought to be decided appears to my mind. It seems to me that it has been established that if a testator, in a testamentary paper duly executed, refers to an existing unattested testamentary paper, the instrument so referred to becomes part of his will; in other words, it is incorporated into it; but it is clear that, in order that the informal document should be incorporated in the validly executed document, the latter must refer to the former as a written instrument then existing—that is, at the time of execution—in such terms that it may be ascertained. A leading case upon this subject is *Allen* v. *Maddock* (2), and it is desirable also to refer to *In the Goods of Mary Sunderland.* (3) It will be seen from a statement of the principle in the form I have just given, that the document which it is sought to incorporate must be existing at the time of the execution of the document into which it is

(1) [1895] P. 66. (2) (1858) 11 Moo. P. C. 427.
(3) (1866) L. R. 1 P. & M. 198.

to be incorporated, and there must be a reference in the properly executed document to the informal document as an existing one, and not as a future document. If the document is not existing at the time of the will, but comes into existence afterwards, and then, after that again, there is a codicil confirming the will, the question arises, as it has done in a number of these cases, whether that document is incorporated. It appears to me that, following out the principle which I have already referred to, the will may be treated, by the confirmation given by the codicil, as executed again, and as speaking from the date of the codicil, and if the informal document is existing then, and is referred to in the will as existing, so as to identify it, there will be incorporation; but if the will, treated as being re-executed at the date of the codicil, still speaks in terms which shew that it is referring to a future document, then it appears to me there is no incorporation. I might put a clear concrete case. Suppose that the will said, "I wish certain articles to be disposed of by my executors in accordance with a list which I shall hereafter write," and the testator then wrote a list such as was contemplated, and then, after that, a codicil was made confirming the will, one of the conditions at the date of the codicil which is necessary for incorporation would be fulfilled, namely, the execution of a document; but the other condition would not be fulfilled, because the will, even speaking from the date of its so-called re-execution by that confirmation by the codicil, would still in terms refer to something which even then was future. I have, perhaps, stated a little more fully than is necessary what was very clearly and shortly said by the President (Sir F. H. Jeune) in the case to which I have referred. (1) Now, referring very briefly to the other authorities, the first which Mr. Deane cited was the case of *In the Goods of Hunt* (2), where the learned judge, Sir John Dodson, was dealing with two schedules which were to be annexed to the will, and where the codicil had been afterwards executed, and he allowed those documents to be incorporated; but it is clear, from reading the remarks which are reported, that no reasons whatever are given for the judgment, and it

(1) [1895] P. 66. (2) 2 Rob. 622.

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does not seem to me that there is anything to shew upon what principle the learned judge acted, or that he was then considering the principles applicable to this matter in the way in which they were subsequently and fully considered in the case of *In the Goods of Lady Truro*. (1) The next case referred to was *In the Goods of Stewart* (2), where Sir Cresswell Cresswell said that the list which was mentioned in the will hardly conformed to the reference to it; but, acting upon *In the Goods of Hunt* (3), he allowed the incorporation, though with doubts. There, again, no reasons were given; but in the case of *In the Goods of Mathias* (4), decided two or three months later, but reported earlier in the same volume, Sir Cresswell Cresswell said no reasons were given for the decision in *In the Goods of Hunt* (3), and he then acted contrary to it. Next comes the important case of *In the Goods of Lady Truro* (1), where the subject was very fully considered, and the principles, so far as I have stated them in my own way, are really laid down. Those principles were applied in *In the Goods of Mary Sunderland* (5) and also in *In the Goods of Mary Reid* (6); and lastly, they are restated and acted upon by the President in the case to which I have referred. (7)

Therefore, to my mind, it is clear that if the terms of the reference in this case indicate a document of a future character there is no incorporation. The words are: "I direct my trustees to give to such of my friends as I may designate in a book or memorandum that will be found with this will." That reference, made at the date of the will, was, I think, clearly made as to a future document. A document next comes into existence, and a codicil is afterwards made; but if you treat the will according to the cases, as speaking at the date of the codicil, the reference is still in terms to a document which, even then, is future, and therefore does not comply with one of the necessary conditions, namely, that it must refer to a document as existing at the date when the will is re-executed.

(1) L. R. 1 P. & M. 201.
(2) 3 Sw. & Tr. 192; 4 Sw. & Tr. 211.
(3) 2 Rob. 622.
(4) 3 Sw. & Tr. 100.
(5) L. R. 1 P. & M. 198.
(6) 38 L. J. (P. & M.) 1.
(7) [1895] P. 66.

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For these reasons I think there ought to be no incorporation of the book, or that part of it which it is sought to incorporate. I suppose that is sufficient to dispose of this application? This is clearly a case in which the executors ought to have the costs of this application out of the estate.

Solicitors: *Willson & Norman.*

H. D. G.

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July 16, 17, 18.

LEONARD AND ANOTHER *v.* LEONARD AND OTHERS.

Probate—Will—Several Sheets of Paper—Destruction of two—Effect—Revocation—Substitution of other Sheets—Execution—Signatures—Clause of Revocation—Intention—Intestacy.

A testator left a testamentary document in the form of a will, which was apparently duly executed, and consisted of five sheets of paper fastened together.

The fact was, however, that the first two sheets were executed in the year following the execution of the last three, and were not part of the document as originally executed. There was no evidence as to the contents of the two that were missing. The two that had been substituted contained the ordinary commencement, followed by a revocation clause, and were signed by the testator in the presence of the same two witnesses who had before attested the others:—

Held, that the destruction of the first two sheets of the original will effected a revocation of the three that remained:

Held, further, that the signing by the testator of the two substituted sheets in the presence of the witnesses was not intended to make them operate as his will, and that the result was an intestacy.

PROBATE SUIT.

The facts, the finding as to which was intimated by the learned judge before the arguments proceeded, were afterwards embodied in his judgment on the points of law raised in the course of the case.

Bargrave Deane, K.C., and *Barnard*, for Miss Jane Leonard, one of the defendants. There is no case exactly like this. *Sweetland* v. *Sweetland* (1) is perhaps the nearest to it. Intention to revoke is necessary, as well as a revocation clause or

(1) (1865) 34 L. J. (P. & M.) 42; 4 Sw. & Tr. 6.

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act of destruction. In the case of *In the Goods of Woodward* (1) there was no evidence as to what was in the first seven or eight lines which had been cut off.

[GORELL BARNES J. There is nothing in the present case to shew what was in the original first two pages. If a testator cut off the first two lines of a will, which in the great majority of wills would only contain the words, "This is the last will and testament of me . . . ." that might not be considered to be an effectual revocation of what remained, which would still be quite complete and intelligible as a testamentary disposition. In the present instance, as well as in the case you have just cited, there was no contemporaneous declaration to shew what the testator's intention really was.]

The whole of the document as it now appears can be admitted to probate by treating pages 1 and 2 as interlineations and alterations within the words of the Wills Act (1 Vict. c. 26), s. 20. The alterations can be by a separate piece or separate pieces of paper.

[GORELL BARNES J. No. Your argument would go the length of saying that a testator could tear up the whole of his will and put something else in its place, and that that is to be deemed an alteration or interlineation.]

The signatures were not put on pages 1 and 2 of this document with the intention that they should be signatures to a will. Those two pages cannot stand alone.

Inderwick, K.C., and *Durley Grazebrook*, for Mrs. M. E. MacDowell (another defendant). The Court has frequently admitted incomplete documents to probate when executed in accordance with s. 9 of the Wills Act. When a document has been properly executed and contains a revocation clause, the question of intention to revoke is not to be considered: *Collins* v. *Elstone*. (2) The evidence of one of the attesting witnesses was that on every occasion when he got them to witness his signature the testator spoke of the document as his will. If pages 1 and 2 are not allowed to stand alone, there should be a total intestacy: *Woodward* v. *Goulstone* (3);

(1) (1871) L. R. 2 P. & M. 206. (2) [1893] P. 1.
(3) (1886) 11 App. Cas. 469.

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Treloar v. *Lean* (1); *In the Goods of Harris* (2); *Williams* v. *Tyley*. (3)

Frank Russell, for the Misses MacDowell (three of the defendants). The effect of the partial destruction by a testator of a testamentary document is concisely stated in Theobald on Wills, 5th ed. at p. 48, where two cases, *Clarke* v. *Scripps* (4) and *In the Goods of White* (5), are referred to. The words at the beginning of page 1 of the document, coupled with the testator's acts on December 9, 1901, when he asked the witnesses to witness his will, amount to a distinct declaration, "This is my last will"; and the Court should give effect to it by admitting pages 1 and 2. The fact that the remaining three pages cannot stand should not be allowed to invalidate pages 1 and 2. If the testator's intention on December 9, 1901, had been merely to identify those two sheets, that would have been quite well served by his own signature alone, without getting the two witnesses to sign in proper legal form. One of the methods of revocation recognised by the Wills Act is by a written instrument duly executed and attested in manner prescribed, and, if a testator selects that method of revocation, he is bound by his own act, and no question of intention arises or can be considered; but if the method of revocation selected by a testator is one of the physical acts of destruction recognised by the statute, then the Legislature has provided that it must be accompanied by an intention to revoke.

R. H. Pritchard, for two infants (other defendants). As no declarations accompanied the acts of destruction, the presumption of law is that the acts were performed animo revocandi. *In the Goods of Lewis* (6) shews the ordinary presumption of law where there is no declaration by the testator and no evidence of how the destruction took place. The first two sheets cannot stand: *Sweetland* v. *Sweetland*. (7)

Priestley and *Rayden*, for the executors (the plaintiffs). The

(1) (1889) 14 P. D. 49.
(2) (1864) 3 Sw. & Tr. 485.
(3) (1858) Joh. 530; 5 Jur. (N.S.) 35.
(4) (1852) 2 Rob. 563.
(5) (1879) 3 L. R. Ir. 413.
(6) (1858) 27 L. J. (P. & M.) 31; 1 Sw. & Tr. 31.
(7) 34 L. J. (P. & M.) 42; 4 Sw. & Tr. 6.

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two sheets executed on December 9, 1901, were executed as a codicil, and therefore put the whole document into force.

GORELL BARNES J. This case is a remarkable illustration of the danger of testators meddling with their wills when once they have executed them properly.

It presents this remarkable feature—that apparently from the books of Messrs. Coutts & Co., with whom he banked, the deceased lodged a will with them on April 24, 1899, took it out on June 14, 1900, lodged it again on June 22, 1900, took it out on August 22, 1900, lodged it on October 1, 1900, took it out on December 31, 1900, lodged it again on June 10, 1901, took it out on November 11, 1901, and lodged it for the last time on December 10, 1901. He died on December 15, and one of the gentlemen named as executors took delivery of the document from Messrs. Coutts & Co. on December 17. It also appears from the evidence of the law scrivener, and the paper which he handed in to me shewing what work he had done for the deceased, and also from the receipts for payments made by the deceased to the law stationer, that the deceased was having various sheets of his will re-engrossed from time to time, until it is exceedingly difficult to know exactly what did take place, except that he was manipulating the document in such a way as has led to this litigation.

Now, the document found after his death has five sheets of paper, each with writing on one side only.

The first, second, third, and fourth written pages are signed by the deceased in his full name of "Hugh Leonard," and the names of the witnesses not signed in full, but "S. Shelley" and "W. Palmer."

On the fifth sheet, which was executed in June, 1900, and bears date the 16th of that month, the deceased duly signed his name in full, and the witnesses attested that signature with their names and descriptions in full: "Samuel Shelley, clerk, Oriental Club, London, W.," and "Albert William Palmer, head waiter, Oriental Club, London." Those five sheets constitute the document now put forward for probate.

The persons who are interested in this estate have raised a great number of questions as to what is the present true position to take up in connection with this document, or under an intestacy or partial intestacy.

The plaintiffs, who are named in the document as the executrix and executor, asked firstly, by their statement of claim, that the whole of the five sheets should be admitted to probate, and, in the alternative, that probate should be granted of the first two sheets.

According to the pleadings filed, the first defendant, Miss Jane Leonard, who is represented by Mr. Deane and Mr. Barnard, asked for probate of all five sheets, or, alternatively, that all should be pronounced against.

Mrs. Mary Elizabeth MacDowell, another sister of the deceased, and who was represented by Mr. Inderwick and Mr. Grazebrook, asked by her defence that the Court should pronounce against all five sheets, or, in the alternative, that the Courts should pronounce against all save the two that were executed on December 9, 1901.

The children of Mrs. MacDowell, represented by Mr. Frank Russell, also ask that only sheets 1 and 2—that is to say, the two sheets executed on December 9, 1901—shall be pronounced for.

The two infant children of a deceased brother and of the plaintiff by their defence also asked the Court to pronounce for those two pages ; but Mr. R. H. Pritchard, who represents them, says they would prefer an intestacy, and accordingly asks me to pronounce against the whole document. There are, therefore, a variety of conflicting suggestions and interests in consequence of the existing state of things in regard to this gentleman's testamentary papers.

There are two questions to decide. The first is a question or questions of fact; the second, what is the law to be applied to the facts. Perhaps this question of law is in reality a mixed question of law and fact.

The questions of fact I have already determined. My view of the document before me is that the sheets 3, 4, and 5 are three of the original sheets of the will executed on June 16,

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1900. I have already indicated that my view is formed partly from the evidence of the witnesses and partly from the evidence of the document itself, which, as pointed out by the law scrivener, has three cuts on the last three pages, shewing that they were originally fastened by means of those three cuts, while there are only two cuts on the pages 1 and 2. I have also found as a fact that the pages 1 and 2 are the pages signed by the deceased on or about December 9, 1901. Those findings of fact lead to the questions of law which have now been fully argued.

It is, I think, obvious that the deceased destroyed the first two pages of the will as it was originally executed, before the date when pages 1 and 2 as they now appear were signed by him and by the witnesses. That is, I think, a fair inference to draw. What, then, has been the effect on the last three sheets of the destruction of the original first two sheets? The destruction, of course, revoked the operation of the two sheets destroyed—that is, of sheets 1 and 2 as they originally stood. I am of opinion that the question of the effect of that destruction on the last three sheets of the document must be decided according to the principles indicated in *Clarke* v. *Scripps* (1) and *In the Goods of Woodward* (2), the effect of which is neatly expressed in the passage cited by Mr. Russell from Theobald on Wills, 5th ed. p. 48.

Applying the principles to be gathered from those cases, I am of opinion, from an examination of the last three sheets of this document, that they are practically unintelligible and unworkable as a testamentary document in the absence of the original sheets 1 and 2, and that the destruction of sheets 1 and 2 must be taken as having had the effect of destroying the validity of the whole will. The testator must be taken to have intended what his act would necessarily lead one to conclude as to his intention: having destroyed the earlier portions—pages 1 and 2—he must have intended to revoke also the remaining portions—pages 3, 4, and 5. He did not intend these last three pages to be his operative will without doing something more. He intended to put two other sheets on to

(1) 2 Rob. 563. (2) L. R. 2 P. & M. 206.

them. Up to that point the will was, in my opinion, legally revoked.

In December, 1901, he signed, and caused the witnesses also to sign, the first two sheets—pages 1 and 2—of the document before me. Thereupon arises the question, What was the effect of that?

Here, again, I think there is ample authority for coming to a conclusion which is partly one of fact and partly of law.

The first authority on the point is *Ewen* v. *Franklin*. (1) The next is *Sweetland* v. *Sweetland* (2), where, taking a similar view, Sir J. P. Wilde said: "The first difficulty is, quo animo did the testator sign the fifth sheet? Ordinarily such a signature would be, I think, 'intended to guard against other sheets being interpolated.' So said Sir John Dodson in *Ewen* v. *Franklin*. (1) Certainly no one would, on the face of the will, conclude that it was intended as the final signature by which the testator's affirmation of the will was to be signified." In that case, the fifth was not the last sheet. The will had been written on six sheets, and the testator had signed the first five, but had not signed the sixth. Another authority is *Phipps* v. *Hale* (3), where Sir James Hannen specially referred to *Ewen* v. *Franklin*. (1)

It becomes, therefore, a question whether, at the time the deceased in the present case signed and caused the witnesses to put their signatures to these two pages (1 and 2), he did that as his will or part of his will, or simply to shew that they formed part of a will to which the signature at the end of the will was to give validity.

In my opinion those signatures were only put on the two pages in question to identify them, and to make them valid if the will was valid at the end. That was, unfortunately, an abortive act. The later sheets had no effect by themselves, and they had no effect to render the sheets 1 and 2 operative.

The result is that none of the sheets can be treated as a valid document of a testamentary character, and my judgment—unfortunate, I am afraid, for some of the parties—must

(1) (1855) Deane's Ecc. 7. (2) 34 L. J. (P. & M.) 42; 4 Sw. & Tr. 6, 8.
(3) (1874) L. R. 3 P. & M. 166.

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be that this will must be pronounced against, and, if there is no other will, there will be an intestacy as to the whole of the deceased's estate.

The costs of all parties must obviously come out of the estate.

Solicitors for plaintiffs: *Sanderson, Adkin, Lee & Eddis.*

Solicitor for defendant (Jane Leonard): *F. H. Edwards.*

Solicitors for defendants (MacDowell): *Charles Russell & Co., for W. Kerr Johnston, Dublin.*

Solicitors for defendants (Leonard infants): *Rowcliffes, Rawle & Co.*

H. D. G.

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July 8, 9.

THE USKMOOR.

Admiralty—Collision—Sound Signals for Vessels in sight of one another—"Course authorized or required by these Rules"—Regulations for Preventing Collisions at Sea, 1897, *art.* 28.

The direction in art. 28 of the Regulations for Preventing Collisions at Sea, 1897, that "when vessels are in sight of one another, a steam vessel under way, in taking any course authorized or required by these rules, shall indicate that course by the (specified) signals on her whistle or syren," is not only imperative, but the word "authorized" includes any course which, for the safety of the vessels, good seamanship requires to be taken with reference to the other vessel then in sight.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of the *Minnetonka*; the defendants were the owners of the *Uskmoor*.

The case is reported only on the meaning of the word "authorized" in art. 28 of the Regulations for Preventing Collisions at Sea, 1897. (1)

(1) "Sound Signals for Vessels in sight of one another."

Art. 28: "The words 'short blast' used in this article shall mean a blast of about one second's duration."

"When vessels are in sight of one another, a steam vessel under way, in taking any course authorized or required by these rules, shall indicate that course by the following signals on her whistle or syren, viz.:—

"One short blast to mean 'I am directing my course to starboard.'

"Two short blasts to mean 'I am directing my course to port.'

"Three short blasts to mean 'My engines are going full speed astern.'"

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The facts, so far as material, were shortly as follows:—

On June 9, 1902, about 10.45 A.M., the weather being fine and clear, the wind light from the north-east, and the tide flood running from two to three knots, the twin-screw steamship *Minnetonka*, of 13,400 tons gross register, from New York to London with a general cargo and passengers, was proceeding up the English Channel between Beachy Head and the Royal Sovereign lightship on a course E. ½ S. magnetic, making about fifteen knots, when those in charge observed about two and a half miles distant, and, as they alleged, about three-quarters of a point on the starboard bow, a steamship which proved to be the *Uskmoor*, of 3587 tons gross register, from Blyth to Cape Town with coals, proceeding down channel on a course W. ¾ S. magnetic, and making about eight knots. As the *Uskmoor* was observed to be acting under a port helm, the *Minnetonka* ported, bringing the vessels port to port; but on observing that the *Uskmoor* was starboarding, the helm of the *Minnetonka* was starboarded, bringing the vessels starboard to starboard. On the *Uskmoor* being observed to be again porting, the helm of the *Minnetonka* was ported, her whistle blown one short blast, and her starboard engine put full speed astern; but the *Uskmoor* again starboarded, and, though the port engine of the *Minnetonka* was also put full speed astern, the *Uskmoor* struck the *Minnetonka* on the port bow, with the stem and bluff of her starboard bow, and afterwards struck her again on the port side.

The owners of the *Uskmoor*, by their defence and counterclaim, in substance alleged that, when first observed, the *Minnetonka* was about seven miles distant, bearing about 2½ points on the starboard bow, that, shortly afterwards, when the Royal Sovereign lightship was abeam, the *Uskmoor* altered her course from W. ¾ S. to W. b. N. magnetic, and when the *Minnetonka* was about two miles distant and bearing about 1½ points on the starboard bow, that vessel was observed to port her helm and pass under the stern of the steamship *Avocet* (which vessel the *Minnetonka* had been overtaking), and then starboarded and straightened a little on the starboard bow of the *Uskmoor*. On seeing the *Minnetonka* starboarding,

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the engines of the *Uskmoor* were stopped, and on the *Minnetonka* porting her helm, causing danger of collision, the engines of the *Uskmoor* were put full speed astern and her helm hard-a-starboard; but the *Minnetonka* came on swinging rapidly under her port helm and the collision occurred, both vessels sustaining damage.

Each vessel charged the other with (inter alia) neglecting to indicate by sound signal the course taken.

Pickford, K.C., *Aspinall, K.C.*, and *Pritchard*, for the plaintiffs, the owners of the *Minnetonka*. When the *Uskmoor* was first observed to be porting the vessels were some miles apart, and the helm of the *Minnetonka* was only ported for the purpose of giving the *Uskmoor* a little more room. There was no risk of collision at that time, and the vessels were only getting into a position of safety, so that there was no necessity for whistling. When the *Uskmoor*, after starboarding, again ported, and there was risk of collision owing to the vessels getting end on, the *Minnetonka* did give one short blast on her whistle to indicate that she also was porting. She, therefore, complied with art. 28, and with the first illustration of the requirements of the rule given in *The Mourne*. (1)

Even if there were a technical breach of the rule, the vessels were at that time so far off that the whistle would not have been heard, and, therefore, the breach could not by possibility have contributed to the collision: *The Argo* (2); *The Posen*. (3)

Robson, K.C. and *Dawson Miller*, for the defendants, the owners of the *Uskmoor*. The alteration of the helm of the *Uskmoor* was for the purpose of rounding the Royal Sovereign lightship, and was not taken with reference to the *Minnetonka*. No sound signal was, therefore, necessary. When there was risk of collision the *Uskmoor* stopped her engines. For that manœuvre there is no appropriate sound signal under art. 28, as the one, two, or three short blasts refer only to directing the course to starboard, or to port, or to working the engines full speed astern. When the *Uskmoor* reversed her engines

(1) [1901] P. 68, at p. 72. (2) (1900) 9 Asp. M. L. C. 74.
(3) *Shipping Gazette*, June 20, 1902.

the collision was inevitable, and no sound signal would have been of any assistance.

Aspinall, K.C., in reply.

THE PRESIDENT (SIR F. H. JEUNE). [After examining the conflicting evidence as to the relative position of the two vessels at the material time, and as to the place of collision, the learned judge continued :—] I am inclined to accept the view of those in charge of the *Minnetonka*, that the collision took place something like a quarter of a mile from the Royal Sovereign lightship, and that the two vessels were approaching port to port when the *Uskmoor* starboarded. That puts that vessel in the wrong; but there are two points made against the *Minnetonka* which require consideration.

The *Uskmoor* appears—whether by mistake or possibly by bad steering—to have performed an extraordinary series of manœuvres in front of the *Minnetonka*, first porting, then starboarding, then porting, and finally starboarding back again. In commenting on her conduct these manœuvres have been described as due to "vacillation," a word which seems to me to represent fairly enough the conduct of those on board the *Uskmoor*. They never seem really to have made up their minds what to do. Probably they never really decided what they were going to do—whether to pass the Royal Sovereign port to port or starboard to starboard.

Under those circumstances it appears to me, and to the Elder Brethren who are assisting me, very important that the *Minnetonka* should give the *Uskmoor* the clearest possible indication of the course she intended to take. From this point of view it is desirable to come to a conclusion about the whistling rule. It is not a simple matter to construe it so as to deal with all possible cases. Its application is limited in two ways. Vessels must be in sight of one another, and must be "taking any course authorized or required by these rules." It is not easy to put a clear interpretation upon the second limitation. The first one is intelligible enough. The rule does not apply where a vessel, in conducting manœuvres in the ordinary course of navigation quite apart from seeing any

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other vessel, thinks it right to port or starboard her helm; but the rule is also limited to "taking any course authorized or required by these rules." It has been sought to put a rather narrow interpretation upon the rule. Of course the word "required" is clear enough. There are certain things required by the rules to be done. The word "authorized" is, however, very much larger, and I am inclined to think that a large interpretation ought to be given to it; and that it includes any course which, for the safety of the vessels, good seamanship requires to be taken with reference to the other vessel then in sight—although it is quite true that there are certain cases where you may say a more distinct authorization arises. For instance, an overtaking vessel, which has to keep out of the way of the overtaken vessel, would be authorized in going to port or starboard, according as the circumstances of the case might require, and, under the crossing rule, the vessel which has to keep out of the way must be considered authorized to do so by one of several means, as the case may seem to require. I do not think the matter ought to be tied down to any narrow interpretation of the rule. But even if it were so, I think in this case it is right to say that the course taken by the *Minnetonka*, according to her own story, was a course authorized by the rules. According to her case, when the other vessel, which was approaching her, ported, she thought it right to port also, and it is by no means certain that might not be brought within the crossing rule, which imposes a duty of keeping out of the way, and authorizes it to be done by any appropriate means; but that in the larger sense of the word her course was authorized by the rules appears to me clear.

On the whole, therefore, it seems to me that under the circumstances of this case the obligation of whistling was imposed upon the *Minnetonka* at an earlier time than the officer who was in charge thought necessary. He did at a later period whistle, and quite rightly. The reason he gave for not doing so before, which I do not wish to press against him, though it probably reflects the mind of a good many sailors, was that he did not think—although the rule is in its terms explicit—that it was necessary to obey the rule except

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in the case of vessels meeting in narrow waters. I wish emphatically to say that the rule is not so limited; and it is necessary to say that with some emphasis, because the experience of this Court shews that the rule has not been followed by the nautical world with the completeness which its terms demand. I hope that, in future, masters of vessels will err, if they err at all, on the side of whistling. I am obliged, therefore, to say that in this case I think the officer in charge of the *Minnetonka* was wrong. I think, when he took action corresponding to the somewhat extraordinary manœuvres which the *Uskmoor* was pursuing in front of him, it was his duty to give the clearest possible indication to the *Uskmoor* of what he was doing, and in that duty he failed. Then it is said that it could and would not have affected the collision; but after considering the question with the Elder Brethren, I am unable to accept that view. If he had given the *Uskmoor* a very clear indication at that time that he was porting—and the inference would be that he would pass port to port—I think it might have been borne in upon the minds of those on the *Uskmoor* that they had to pass port to port; and it would have prevented, I think, or might have prevented, the *Uskmoor* from afterwards attempting the extraordinary manœuvres she did perform.

I think the *Uskmoor* did not have the help which would have been afforded her by a very clear whistle. Then I have to consider the closely analogous question of the *Minnetonka's* stopping. She did at a later stage help matters by stopping one of her two engines, and later on she put the engines full speed astern. She recognised at a later stage, at any rate, that it was her duty to bring herself to a standstill, and I cannot help thinking, and the Elder Brethren agree with me, that it was her duty under the circumstances to have stopped and brought herself to a standstill at an earlier time. The result is that I am compelled to hold both vessels to blame.

Solicitors for plaintiffs, the owners of the *Minnetonka*: *Pritchard & Sons.*

Solicitors for defendants, the owners of the *Uskmoor*: *Botterell & Roche.*

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Admiralty—Insurance (Marine)—General Average—Time Charter—Voyage Charter—Damage by Water in extinguishing Fire—Delay—Time Freight—Practice of Average Adjusters.

By the practice of average adjusters, loss of time freight—resulting from detention under repair of general average damage—is not allowed in general average :—

Held, by Gorell Barnes J., that the practice is right, being in accordance with legal principles, for the loss of freight under a time charter caused by the delay is the result of an accidental circumstance peculiar to the shipowner and time charterer, and arising out of the contract between them, with which the cargo owner is not concerned, and where loss of time is common to all the parties interested, and all suffer damage by the delay, the damage by loss of time may be considered proportionate to the interests, and, therefore, left out of consideration.

The words "all loss" in the definition of a general average sacrifice in *Birkley* v. *Presgrave*, (1801) 1 East, 220, at p. 228; 6 R. R. at p. 263, explained.

ACTION on a marine policy of insurance to recover a sum of 66*l.* 18*s.* 6*d.*

The plaintiff was Ralph Milbanke Hudson, registered managing owner of the *Leitrim*, suing on behalf of himself and the other co-owners.

The defendants were the British and Foreign Marine Insurance Company, Limited.

The case raised the question whether the plaintiff shipowner was entitled to have made good in general average the loss of time freight due to the detention of the vessel whilst under repair of damage resulting from a general average sacrifice.

The admitted facts were as follows :—

The *Leitrim* is a steel screw steamship of Sunderland, of 4824 tons gross, and 2811 tons net, register and, for the purpose of carrying frozen meat, she is fitted with refrigerating machinery and insulated space, her No. 2 lower hold being insulated by means of two layers of match-boards between which are charcoal and paper. Inside the chamber and fixed to these boards, for the purpose of refrigeration, brine-pipes

are carried along the sides and the top and bottom of the chamber, and pass from it through a cross-bunker to the refrigerating engine.

By a time charterparty dated February 2, 1900, the *Leitrim* was chartered by the plaintiff to William Milburn & Co. for five calendar months from the date of her delivery to the charterers in London.

By clause 3 the owners were to provide and pay for all the provisions, wages, and consular shipping and discharging fees of the captain, officers, engineers, firemen, and crew, and pay for the insurance of the vessel; also for all engine-room stores, and maintain her in a thoroughly efficient state in hull and machinery, both for propelling and refrigerating purposes, for and during the service.

By clause 6 the charterers were to pay for the use and hire of the vessel at the rate of 1680*l.* per calendar month, commencing on and from the day of her delivery, and at and after the same rate for any part of a month; hire to continue until her delivery to the owners.

By clause 16 the charterers were to "have the option of continuing the charter for a further period of five months."

(This option was exercised, and the time of the employment of the vessel would expire on January 20, 1901.)

By clause 17, "in the event of loss of time from deficiency of men or stores, breakdown of machinery, or damage preventing the working of the vessel for more than twenty-four working hours, the payment of hire shall cease until she be again in an efficient state to resume her service; and should she in consequence put into any other port than that to which she is bound, the port charges and pilotage at such port to be borne by the steamer's owners; but should the vessel be driven into port or to anchorage by stress of weather, or from any accident to the cargo, such detention or loss of time shall be at the charterer's risk and expense."

By clause 28 the charterers were to "have the liberty of sub-letting the steamer for Admiralty transport or other service, charterers remaining responsible for due fulfilment of the conditions of this charter."

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By a policy dated June 18, 1900, and issued by the defendant company, the *Leitrim* was insured by her owners for 4000*l*.

By a voyage charterparty, dated September 5, 1900—that is, whilst the vessel was still under the time charter—the time charterers, William Milburn & Co., sublet the *Leitrim* to Houlder Brothers & Co. for a voyage from Barry to Cape Town with a cargo of coals, at a rate of freight of 35*s*. per ton delivered. By clause 11, "in case of average, the same to be settled according to the York-Antwerp Rules, 1890."

The vessel, after bunkering at Liverpool, proceeded to Barry, and on September 12 began loading the coals in No. 2 hold, the loading in that hold being completed the next day. On September 15, whilst the loading was proceeding in the other holds, fire broke out in No. 2 hold, and spread to the bunker coals stowed in the cross-bunker abaft that hold. To extinguish the fire it was found necessary to pour large quantities of water into both No. 2 hold and into the cross-bunker. After the fire was extinguished, the coals from No. 2 hold and from the cross-bunker were landed and sold.

A portion of the insulation in No. 2 hold was damaged by the fire, and parts of the steelwork of that hold and in the cross-bunker were burned and buckled. In addition to this fire damage to the insulation, the employment of water to extinguish the fire so damaged the charcoal and paper of the insulation as to necessitate the renewal of nearly all of it, and, in order to replace and repair it, all the brine-pipes in this hold and in the cross-bunker were necessarily removed.

The time occupied in extinguishing the fire, discharging the damaged coals, and entirely repairing and refitting the vessel extended from September 15 to October 24, a period of thirty-nine days. The time necessary for the repair of the insulation damaged by water, together with the incidental removal and reinstalment of the brine-pipes, would by itself have been thirty-one days.

After the repairs to the ship were completed, fresh coals were shipped to replace those discharged, and the voyage to the Cape was duly prosecuted.

In respect of the period of thirty-nine days, the time charterers,

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Milburn & Co., claimed, and were properly allowed by the plaintiff, a deduction from the hire of the vessel of 2160*l.* under clause 17 of the charterparty of February 2, 1900.

A statement of general and particular average was prepared, dated February 11, 1901, to which the plaintiff objected, on the ground that it did not allow the loss of hire, which he contended should be made good in general average as a voluntary sacrifice.

A supplementary statement was then prepared, dated January 14, 1902, allowing to general average the sum of 1340*l.* 2*s.* 11*d.* as "net loss of time freight resulting from detention under repair of general average damage exclusively after crediting wages and provisions of crew already allowed in general average," and the question for the opinion of the Court was: Whether this sum of 1340*l.* 2*s.* 11*d.* was rightly included in general average. If so, the plaintiff was to be taken to be entitled to recover 66*l.* 18*s.* 6*d.* If not, judgment was to be entered for the defendants.

Average adjusters were called by the defendant company, and gave evidence that it was not the practice in average adjustment to include loss of time freight.

July 7. *Carver, K.C.*, and *Cambier*, for the plaintiff, the owner of the *Leitrim*. The total period occupied by the repairs was thirty-nine days, of which only eight were required in respect of the damage actually caused by the fire, leaving thirty-one days as the time necessarily occupied for the repair of the insulation damaged by water voluntarily pumped into the hold and cross-bunker to extinguish the fire together with the removal and refitting of the brine-pipes. The hire under the time charter was 1680*l.* per calendar month, and the plaintiff, therefore, claims in general average for the loss of this hire for the thirty-one days as sacrificed for the general benefit, and amounting to 1716*l.* 18*s.* 5*d.*, against which the owner credits 376*l.* 15*s.* 6*d.* allowed in the adjustment for crew's wages and provisions under the York-Antwerp Rules, leaving a net claim on all interests of 1340*l.* 2*s.* 11*d.*, of which the proportion due from the defendant company by way of balance, after giving

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credit for the amount received under the original average statement, is 66*l.* 18*s.* 6*d.*, the sum claimed in the action.

It is submitted that the plaintiff is entitled as owner to a contribution in general average in respect of this time hire, actually and admittedly lost, by reason of the general average act of pouring the water into the hold to save ship and cargo from destruction. This loss of hire in respect of the time occupied in repairing the water damage was a general average sacrifice. It was voluntary, extra-ordinary, intended for the common safety of ship and cargo, and was incurred in an emergency. The loss was a direct consequence of the general average act, and on principle there is no reason why loss of time freight directly caused by the general average act should not be made good in general average.

The accepted definition of a general average sacrifice according to English law is that of Lawrence J. in *Birkley* v. *Presgrave* (1), namely, "All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo come within general average, and must be borne proportionably by all who are interested." The words "all loss" are perfectly general, and will include the loss of time freight; for, although claims for delay of a speculative character have not been, and should not be, introduced into a general average statement, the present claim is definite, and can be ascertained precisely. The question in these cases is: What was the position at the end of the voyage? Anything lost by general average down to that time should be made good; but the value of the ship at destination will not include the lost hire, and, therefore, contribution to ship is not enough unless the lost hire is also made good.

[The cases of *Da Costa* v. *Newnham* (2), *Power* v. *Whitmore* (3), and *Anglo-Argentine, &c., Agency* v. *Temperley* (4) were referred to on the question of the allowance in this case of the wages and provisions of the crew, under the York-Antwerp Rules, during the general average repair.]

(1) 1 East, 220, at p. 228; 6 R. R. 256.

(2) (1788) 2 T. R. 407.

(3) (1815) 4 M. & S. 141; 16 R. R. 416.

(4) [1899] 2 Q. B. 403.

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Scrutton, K.C., *Hamilton, K.C.*, and *MacKinnon*, for the defendants. The evidence produced shews that this claim involves a new subject-matter of contribution, as, by the universal practice of average adjusters, loss of time freight is not treated as a general average loss. This practice is in accordance with principle, as shewn by the facts of the present case; for the loss of hire was not due to the pouring of water on the coals to extinguish the fire, but to the operation of clause 17 of the time charter, which provided for the cessation of hire whilst the vessel was inefficient by reason of damage. That was a matter between shipowner and time charterer, with which the cargo owner had no concern. The repairs were not necessary to the safety of the cargo, as there was no reason, so far as the coals were concerned, for refitting the insulation, so that there was no sacrifice for the particular adventure in which the ship was then engaged. The loss was a consequence following on delay, and it is not the practice to go outside the common adventure and take that class of loss into consideration, for "all" loss is not included. Contribution is limited to ship and cargo, and freight on that cargo, that is, to the interests within the common adventure. Demurrage during repairs, wages, and provisions, loss of market of cargo, loss of interest on freight, or on value of cargo by delay, are not allowed. So where there is a charterparty, and goods have been shipped under bills of lading, which reserve a different rate of freight, it is the practice in assessing the shipowner's claims and liabilities to regard the bill of lading freight only: Carver on Carriage of goods by sea, 3rd ed. (1900), § 435. Clause 11 of the voyage charter incorporates the York-Antwerp Rules, and as the shipowner gave authority to sublet, and allowed the shipment under those rules, the practice governs and excludes this claim in the adjustment of general average.

[They referred to Lowndes on General Average, 4th ed. (1888), sects. 67, 68, 73; York-Antwerp Rules, 1890, xi. xvi. xvii. xviii.]

Carver, K.C., in reply. The practice of average adjusters professes, and is intended, to follow the law, and if the practice

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is wrong it cannot control the law: *Atwood* v. *Sellar*. (1) The argument on behalf of the defendant company is in effect that it is hard upon the cargo owner that he should be called upon to contribute for a loss of time hire of which he knew nothing, and that the detention of the ship by a general average act is not ordinarily allowed as a subject of contribution; but in respect of this time freight there was a sacrifice which must be made good, for it meant to the shipowner the loss of a definite legal right.

Cur. adv. vult.

Aug. 6. GORELL BARNES J. In this case the managing and part owner of the steamship *Leitrim* claims on behalf of himself and the other co-owners a sum of 66*l*. 18*s*. 6*d*., alleged to be due on a policy of marine insurance on the steamship dated June 18, 1900. The defendants, the British and Foreign Marine Insurance Company, dispute the claim, and, the matter having been brought before me, it was agreed that the question for the decision of the Court was: whether an item of 1340*l*. 2*s*. 11*d*. for sacrificing time hire was rightly included in the adjustment of general average. If it is rightly included, it was agreed that there is to be judgment for the plaintiffs for 66*l*. 18*s*. 6*d*., and if it was not rightly included, there is to be judgment for the defendants.

The plaintiff sues on a policy for 4000*l*. on the *Leitrim*. She is a large vessel, fitted for carrying frozen meat in No. 2 lower hold. She was chartered by time charter, dated February 2, 1900, to Messrs. William Milburn & Co., and the period of hire would expire about January 20, 1901. The hire, according to the charterparty, was at the rate of 1680*l*. per calendar month, and there was a cesser clause in the charter which was in these terms: [The learned judge read clause 17, already set out, and continued:—] There was also in the time charter a power to sublet, the charterers remaining responsible for the due fulfilment of the conditions of the charter. The vessel was sublet by a charter dated September 5, 1900, to Messes. Houlder, Brothers & Co., for the purpose of carrying a

(1) (1880) 5 Q. B. D. 286.

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cargo of coals from Barry to Cape Town. Freight was to be paid at the rate of 35*s.* per ton "delivered, or on bill of lading quantity, less 2 per cent., at receiver's option, to be declared in writing before cargo is broken." On September 15, whilst she was loading coals at Barry, a fire broke out in No. 2 lower hold, and the following statement of what occurred is taken from the admissions of facts: "In order to extinguish the fire, it was found necessary to pour large quantities of water into both No. 2 hold and into this cross-bunker"—to which in the previous paragraph it is stated the fire spread. "After the fire was extinguished, the coals from No. 2 hold and from the cross-bunker were landed and sold, and were eventually replaced by new shipments. A portion of the insulation in No. 2 hold was damaged by the fire, and parts of the steelwork of that hold and in the cross-bunker were burned and buckled. In addition to this fire damage to the insulation, the employment of water to extinguish the fire so damaged the charcoal and paper of the insulation as to necessitate the renewal of nearly all of it, and in order to replace and repair it all the brine-pipes in this hold and in the cross-bunker were necessarily removed. The time occupied in extinguishing the fire, discharging the damaged coals, and entirely repairing and refitting the vessel extended from September 15 to October 24, a period of thirty-nine days. The time necessary for the repair of the insulation damaged by water, together with the incidental removal and reinstatement of the brine-pipes, would by itself have been thirty-one days. In respect of the period of thirty-nine days Messrs. Milburn & Co. claimed, and were properly allowed by the plaintiff, a deduction from the hire of the vessel of 2160*l.* under clause 17 of the charterparty of February 2, 1900."

An average statement was made up, which was put before me when the case was argued, and according to that statement, as originally prepared, the 4000*l.* insured with the British and Foreign Marine Insurance Company was to pay 210*l.* 5*s.* 6*d.* At the request of the plaintiff, the average statement appears to have been reconsidered, and an addition is to be found in a further statement towards the end of the document. That is,

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"net loss of time freight resulting from detention under repair of general average damage exclusively, after crediting wages and provisions of crew, already allowed in general average, 1340*l.* 2*s.* 11*d.*" Then the statement goes on: "Allow to general average 1340*l.* 2*s.* 11*d.*" That really represents the deduction of the time hire which the charterers have made as against the shipowner in respect of the thirty-one days to which I have already referred in the statement of the facts, which was the time necessary for the repair of the insulation damaged by water together with the incidental removal and reinstatement of the brine-pipes. It is to be observed that it is not the full amount of the deduction, because there has been included already in the general average statement the wages and provisions of the crew. That appears to have been done because the sub-charter included the York-Antwerp Rules.

The result is that the sum of 1340*l.* 2*s.* 11*d.* is introduced into the general average statement as "the net loss of time freight resulting from detention under repair of general average damage." Then there is an apportionment further on in the amended statement, in which the matter is thus treated: the steamer is put down as of net value, including made good, 34,810*l.*, and its proportion of general average at 3038*l.* 7*s.* 5*d.*; the insulation, including made good, is put down at 8050*l.*, and its proportion of general average at 702*l.* 12*s.* 9*d.* Then there comes the part of the apportionment which gives rise to the difficulty, namely, "total freight at risk, less port charges, wages, &c., 7026*l.*"; of which it is stated there was at risk of charterers 5544*l.*, and at risk of shipowner 1482*l.*, add made good on account of loss of time hire 1340*l.* The total amount of shipowners' time freight to contribute is put down at 2822*l.* Then, freight which is put down as at the risk of the charterers, namely 5444*l.*, is made to bear in general average a contribution of 483*l.* 18*s.* 1*d.*, and the freight at risk of shipowner has to contribute 246*l.* 6*s.* 4*d.* The cargo then, "as per previous statement," is put down at 4726*l.*, and has to bear 412*l.* 10*s.* 2*d.* Then, when that is apportioned so as to apply to the policy affecting the defendants, the original figure which I have men-

tioned as payable by them, namely, 210*l.* 5*s.* 6*d.*, becomes 277*l.* 4*s.* The balance to pay is 66*l.* 18*s.* 6*d.*, the amount sued for in this action.

The question raised by these facts is novel and difficult, and so far as I am aware it has not been considered in the courts. It was, however, well argued before me by counsel on both sides, and evidence was given by experienced average adjusters to the effect that, according to the practice of average adjusters, a loss of time charter freight in such cases is never included in general average. No evidence to the contrary was given, and I think, therefore, it may be taken that the practice of average adjusters is uniform on this matter.

The question, therefore, comes to be whether this practice is right, because, although it was suggested by counsel for the defendant company that, as the sub-charter provided that in case of average the same was to be settled according to the York-Antwerp Rules, 1890, and that under rule 18 of those rules—"Adjustment, except as provided in the foregoing rules" (which do not apply to the present case) "the adjustment shall be drawn up in accordance with the law and practice that would have governed the adjustment had the contract of affreightment not contained a clause to pay general average according to these rules"—the adjustment should be in accordance with the practice, yet that rule does not, in my opinion, mean that the adjustment is to be in accordance with practice if the practice conflicts with the law. I have, therefore, to determine what is the law applicable to this case.

The real question appears to me to be whether the shipowner is entitled to some compensation in general average for the delay caused by the sacrifice. I do not think that the question is whether he is entitled to be compensated in general average for the particular consequences of the delay in this case, because that would be to make the rights and liabilities of the cargo owners depend entirely on the contract of time charter, to which they are in no way parties. The shipowner's loss of freight is caused by the operation of the cesser clause No. 17 in the original time charter. If that clause had not been inserted, the time charterers would have remained liable

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to pay the freight in accordance with the principle upon which the old case of *Ripley* v. *Scaife* (1) was decided, and, in my opinion, the cargo owners ought not to be affected by the question whether the loss of time falls, by the contract between the shipowner and time charterers, to be borne by the one or the other. If the time charterers had to continue paying freight during the delay, the measure of their loss would appear to be the loss of the benefit which would have accrued to them but for the delay.

Counsel for the plaintiff relied upon the well-known passage in Lawrence J.'s judgment in *Birkley* v. *Presgrave* (2), which is: "All loss which arises in consequence of extraordinary sacrifices made or expenses incurred, for the preservation of the ship and cargo, comes within general average, and must be borne proportionably by all who are interested." They argued that the hire for thirty-one days was lost by the sacrifice, and that therefore it ought to be borne proportionably by all who are interested. But, in my opinion, the words "all loss" in this and other statements of the principle of general average have not the width of meaning attributed to them by the plaintiff's counsel. They ought not, I think, to be held to extend to include losses which—to use a term which has been employed—are the result of "accidental circumstances" affecting the loser, and are not losses which the other persons interested ought in ordinary course to be treated as concerned with. This term is to be found in the judgment of Lord Esher in *Rodocanachi* v. *Milburn*. (3) That was an action by charterers against shipowners for non-delivery of cargo, and the plaintiffs had sold the cargo to arrive. It was held that, in estimating the damages, the market value at the time when the cargo should have arrived must be looked at, and not the price at which the plaintiffs had sold the cargo. Lord Esher said: "But the value is to be taken independently of any circumstances peculiar to the plaintiff. It is well settled that in an action for non-delivery or non-acceptance of goods under a contract of sale, the law does not take into account in

(1) (1826) 5 B. & C. 167; 29 R. R. 205. (2) 1 East, 220, at p. 228.
(3) (1886) 18 Q. B. D. 67, at p. 77.

estimating the damages anything that is accidental as between the plaintiff and the defendant, as, for instance, an intermediate contract entered into with a third party for the purchase or sale of the goods. It is admitted in this case that, if the plaintiffs had sold the goods for more than the market value before their arrival, they could not recover on the basis of that price, but would be confined to the market price, because the circumstance that they had so sold the goods at a higher price would be an accidental circumstance as between themselves and the shipowners; but it is said that, as they have sold for a price less than the market price, the market price is not to govern, but the contract price. I think that if the law were so, it would be very unjust. I adopt the rule laid down in Mayne on Damages, which gives the market price as the test by which to estimate the value of the goods independently of any circumstances peculiar to the plaintiff, and so independently of any contract made by him for the sale of the goods. That rule gives the mode of estimating the value which is to be taken for the purpose of arriving at the damages."

It is for similar reasons that although, where goods have been sold to arrive and have been jettisoned in circumstances giving rise to a general average loss, the actual loss to the merchant is the price at which the goods were sold, yet the market value of the goods at the time of the ship's discharge is the basis of compensation. So, also, in my opinion, the reason why—where a ship has been chartered at one rate of freight and goods have been shipped at a different rate of freight—the chartered freight is left out of consideration in assessing the compensation for freight lost by jettison of goods, is that the chartered freight is a matter with which the owners of cargo are not concerned, and its loss may be termed an "accidental circumstance" peculiar to the shipowner.

These considerations lead me to the conclusion that the cargo owners have no concern with the contract between the shipowner and the time charterers, that the loss of freight under it caused by the delay is the result of an accidental circumstance peculiar to the shipowner and time charterers, and that the question is whether the shipowner is entitled to

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be compensated in general average on the basis of the ordinary consequences of the delay as if the ship were carrying the goods simply under the contract under which they were shipped. This is a different question from that which has been discussed in text-books as to the allowance in general average, to the owners, of the expenses of maintaining and paying the crew during the delay caused by the execution of repairs rendered necessary by a general average sacrifice. I know it has been thought by some that by common law these expenses are not to be included in general average in such a case, but the cases which are referred to by Mr. Lowndes, and criticised by him on page 241 of his work, do not appear to me to go to this length, and I agree with what Thesiger L.J. said in *Atwood* v. *Sellar* (1), that "As a matter of fact, it is extremely doubtful whether the expenses for wages of crew or provisions in a port of refuge have ever been disallowed by our Courts, as constituting a claim for general average, in a case where the ship has put into the port to repair damage itself belonging to general average." The wages and provisions of the crew during the delay in question have been allowed in general average in the present case apparently under the York-Antwerp Rules, which are referred to in the sub-charter, and I have not to decide anything about them, though as at present advised there appear to me to be strong reasons for holding that at any rate wherever the delay is to repair damage, which is itself the subject of general average, the wages and maintenance of the crew during such delay should be allowed by law in general average. But it does not at all follow that the mere loss of the profitable employment of the vessel as distinguished from actual expenses should in such a case be allowed. In the first place, so far as I can ascertain, a loss of this character has never been claimed in general average. It is not introduced in the York-Antwerp Rules, nor can I find any trace of it being allowed by the laws of any foreign country, though many of them contain provisions as to the allowance in general average of the wages and maintenance of the crew.

It may be said, why on principle should not the loss of time

(1) 5 Q. B. D. 286, at p. 291.

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be compensated for where that loss is due to the necessity for repairing damage, itself the subject of general average? I think the answer is that although possibly there may be cases in which the loss of time is not common to all concerned, at any rate in cases like the present the loss of time is common to all the parties interested, and all suffer damage by the delay, so that the damages by loss of time may be considered proportionate to the interests, and may be left out of consideration. Were this otherwise, great inconvenience would arise, and enormous difficulty be found in attempting to ascertain what was the proper amount of loss on each of the numerous interests which go to make up a shipping adventure. An average adjuster has a heavy task now when he has to deal with actual losses and values, but if he were also to have to assess speculative and estimated losses his task would be still heavier. Moreover, this inconvenience and difficulty is practically obviated by treating everyone's loss of time as proportionate to his interests, and not bringing it into account. This appears to work substantial justice, for, reverting to what I have said about "accidental circumstances peculiar to a party," it seems clear that if the losses by delay—I am not dealing with expenses—were to be investigated, accidental circumstances would be excluded, with the result that all that could be considered would be the loss of the profitable employment during the delay of the capital invested in each interest concerned; and it would be unreasonable and difficult and involve very speculative inquiries to embark upon an examination of what, upon such a basis, would be the loss on each interest; so that for all practical purposes the losses may be considered as proportionate to the interests, and left out of consideration altogether. Counsel for the plaintiff felt the difficulty there is in allowing claims for delay of a general character to be introduced into a statement of general average, and they endeavoured to distinguish between such claims and that in the present case, the former, as they said, being speculative, and the latter definitely ascertainable. But, as I have already noticed, this definite loss is due to arrangements between the actual owner and the owners pro hac vice of the vessel, which ought not to

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affect cargo owners who have no cognizance of such arrangements, and are not parties thereto, and place their goods on board the vessel on the terms that they shall be subjected to the ordinary incidents involved in so doing.

In my opinion, therefore, the practice affecting this matter, proved by the average adjusters who have been called, is in accordance with legal principles and is right, and I answer the question submitted to me in the negative. The consequence is that judgment will be entered for the defendants, with costs.

Solicitors for plaintiff: *Botterell & Roche.*

Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

T. L. M.

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July 21; *Aug.* 11.

[IN THE COURT OF APPEAL.]

ASHCROFT *v.* ASHCROFT AND ROBERTS.

Husband and Wife—Divorce—Permanent Alimony—Maintenance of Guilty Wife—Special Circumstances—Conduct of Husband—Discretion of Court—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 32.

There is no rule of practice that a wife against whom a decree nisi for dissolution of marriage is pronounced must shew special circumstances to entitle her to an order under s. 32 of the Matrimonial Causes Act, 1857, that the decree shall not be made absolute except upon the condition of the husband securing a provision for her support. The Court has an absolute discretion vested in it by the section, to be exercised according to the circumstances of each case. Thus, it will order the husband to secure a provision for his guilty wife, even though his own conduct has been unimpeachable, if the wife is proved to be entirely without means of support and unable through ill-health to earn her own living.

Robertson v. *Robertson*, (1883) 8 P. D. 94, considered.

Decision of Gorell Barnes J. affirmed.

THIS was a petition by a husband for dissolution of marriage on the ground of the adultery of his wife, the respondent, with the co-respondent. He also claimed 500*l.* damages from the co-respondent, and the custody of the children of the marriage.

The parties were married in 1879, and there were five children of the marriage.

The trial of the action occupied three days in July, 1902, before Gorell Barnes J. and a special jury, but the petitioner's claim for damages was withdrawn. In the result the jury found that the respondent and co-respondent had committed adultery: whereupon counsel for the petitioner applied to the judge for the usual decree nisi. The question then arose whether the petitioner should not be ordered to make some provision for his wife, who otherwise would now, after twenty-three years of married life, be left totally unprovided for, she having, it was said, no means of her own. The learned judge thereupon suspended the pronouncing of the decree nisi to enable the wife to make an application to the Court under s. 32 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), which enacts that: "The Court may, if it shall think fit, on any such decree"—i.e., a decree for dissolution of marriage under s. 31—"order that the husband shall to the satisfaction of the Court secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable, . . . and for that purpose may refer it to any one of the conveyancing counsel of the Court of Chancery to settle and approve of a proper deed or instrument to be executed by all necessary parties; and the said Court may in such case, if it shall see fit, suspend the pronouncing of its decree until such deed shall have been duly executed."

The wife accordingly applied under that section that no decree for dissolution of the marriage should be pronounced except upon the condition of the husband making some suitable provision for her.

It appeared from affidavits filed upon that application, and also upon a previous application by the wife for alimony pendente lite, that of the five children of the marriage the eldest had attained twenty-one, the other four being infants, aged respectively twenty, fifteen, seven, and three; that the husband was carrying on business as a timber-merchant in Liverpool, in partnership with his father, the profits being divided between them in equal shares; that his total income

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consisted of a sum of about 500*l.*, being his average share of the profits of the business, and that he had no other property whatever except his moiety of a sum of 3500*l.*, the value of his firm's stock-in-trade; also that the wife had no available means of her own whatever, and had no relations to whom she could look for support, and moreover was in delicate health and unable to earn her own living. In fact during the trial she had a fainting fit in court, which necessitated an adjournment of the trial till the following day.

Upon this evidence the question came on for argument whether, notwithstanding the proved guilt of the wife, the husband could be required, under the above section, to secure an allowance to the wife as a condition for a decree for dissolution of the marriage.

Barnard, for the wife, submitted that the section gave the Court the fullest discretion in the matter, and that, inasmuch as the wife had been married twenty-three years, had given birth to five children, was in bad health, and had absolutely nothing to live upon, justice required that the husband should be ordered to make some provision for her.

H. Newson, for the husband, contended that it was not in the interest of public morality that a guilty wife should be entitled to support from her injured and innocent husband. [He cited and distinguished the following cases: *Edwards* v. *Edwards* (1), *Pryor* v. *Pryor* (2), *Lander* v. *Lander* (3), *Parry* v. *Parry* (4), and *Latham* v. *Latham*. (5)]

Barnard, in reply.

GORELL BARNES J. The jury in this case found that the wife had been guilty of adultery with the co-respondent, and therefore the petitioner applied for a decree nisi; and the question was left for consideration whether that decree should be pronounced subject to his making some provision for his wife, so as to prevent her being cast destitute on the world.

(1) [1894] P. 33.
(2) [1900] P. 157.
(3) [1891] P. 161.
(4) [1896] P. 37.
(5) (1861) 30 L. J. (P. & M.) 43.

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Now, the application made on the part of the wife is made under the 32nd section of the Act of 1857, which is as follows: [The learned judge read the section, and continued:—]

To my mind, this section gives an entire and absolute discretion to the Court, and the only question is whether I should exercise the discretion in this case. [The learned judge then stated the facts of the case as they appeared from the affidavits, pointing out that the wife was absolutely destitute; and, upon the evidence as to the wife's bad state of health, said this was confirmed by the circumstance of her having fainted in court during the trial, and proceeded:—]

I am satisfied, therefore, that the wife is practically unable to earn her living or to obtain any support; and I think, exercising my discretion, it is right that the husband should be required to provide a small maintenance for her, so that she may not be turned out destitute on the streets.

Of course it is difficult to determine what is the proper allowance to make, having regard to all the circumstances. I have considered the matter and looked through the cases cited to me in which this question has been dealt with; and I think, taking all the facts into consideration, it would be proper that the husband should make an allowance of 1*l.* a week. I, therefore, pronounce a decree nisi, with costs against the co-respondent, but direct that the decree be not made absolute until the husband has secured to the wife 1*l.* a week during their joint lives dum sola et casta vixerit. I also order that the four infant children of the marriage remain in the custody of the husband until further order, but with a direction that they shall not be removed out of the jurisdiction of the Court without its sanction.

The husband appealed from so much of the order as directed that the decree absolute should be conditional upon his securing the weekly provision for the wife. Leave to appeal had been given by the learned judge, having regard to the dictum of Lindley L.J. in *Robertson* v. *Robertson*. (1)

(1) 8 P. D. 94, 98.

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H. Newson, for the husband. Such orders have, no doubt, been made for an innocent wife, but not for a guilty wife. No misconduct on the part of the husband has been suggested here to justify such an order as this. The discretionary jurisdiction vested in the Court by s. 32 must be exercised subject to the ability of the husband to make a provision for the wife and to the conduct of the parties. Where there is nothing to be alleged against the successful husband, the decree absolute cannot be made dependent upon his complying with this condition. The learned judge did not deal with the conduct of the parties at all: he proceeded entirely on the ground of the delicate state of the wife's health; but that is not a sufficient ground for this order. There is no reported case in which the Court has given an allowance to the guilty wife unless there has been some fault on the side of the husband, or he has received some benefit from the wife in the way of money.

The first reported case in which provision was ordered for a guilty wife is *Latham* v. *Latham* (1), where the husband obtained damages which were ordered to be invested in a Government annuity for the wife's benefit; but Cresswell J. refused, as being against the interests of morality, to grant a provision for the wife out of the earnings of her innocent husband. The order here is, in effect, to pay out of the husband's earnings, for those are his only source of income.

[VAUGHAN WILLIAMS L.J. *Robertson* v. *Robertson* (2) seems to be an authority against you.]

There the question was whether special circumstances were required to induce the Court to give permanent alimony to a guilty wife; and the Court of Appeal, under the particular circumstances of that case, declined to disturb the order of the Court below, refusing to order a provision for the guilty wife. It is pointed out in the argument that the practice is not to order permanent alimony to a guilty wife except with the consent of the husband or under special circumstances; and this is borne out by the authorities. The section is, in fact, only intended to apply where the husband is the guilty party:

(1) 30 L. J. (P. & M.) 43. (2) 8 P. D. 94.

Winstone v. *Winstone*. (1) The circumstances of the present case are not such as to justify the exercise of the jurisdiction of the Court in favour of the wife. *Bent* v. *Bent* (2) and *Keats* v. *Keats* (3) are both distinguishable. In the former case, which was that of a guilty wife, the husband had received a sum of 1678*l*. in right of his wife, and he expressly consented to settle 1000*l*. of it upon the wife. In the latter case, also that of a guilty wife, the wife gave up an interest under a settlement in order to obtain an allowance from the husband, and the husband got the damages. In both cases the husband got more than he gave up. *Edwards* v. *Edwards* (4) is also distinguishable, for there the successful husband had been guilty of cruelty. So in *A.'s Divorce Bill* (5), the husband having been guilty of misconduct, the House of Lords refused to pass his divorce bill except upon the condition of his making a provision for his wife, notwithstanding her guilt. Again, in *Parry* v. *Parry* (6) the reason why the husband was ordered to make a provision for his guilty wife was that he had conduced to his wife's adultery.

The practice under the section should not be extended by throwing such a burden upon an innocent husband, who has received nothing from his wife and has obtained no damages.

Barnard, for the wife, was not called upon.

VAUGHAN WILLIAMS L.J. I think it is really admitted that under the terms of s. 32 the Court has an absolute discretion. The words of the section are quite plain. [The Lord Justice then read the section, and continued:—]

The objection which is raised by the appellant to the order which has been made by the learned judge is in fact an objection based upon the practice of the Court. It is said that the practice is correctly stated by Mr. Inderwick in his argument in *Robertson* v. *Robertson* (7), where he says: "The practice under the Divorce Act in this respect has not been similar to that of the House of Lords under the old law. Up

(1) (1861) 30 L. J. (P. & M.) 109.
(2) (1861) 2 Sw. & Tr. 392.
(3) (1859) 28 L. J. (P. & M.) 57.
(4) [1894] P. 33.
(5) (1887) 12 App. Cas. 366.
(6) [1896] P. 37.
(7) 8 P. D. 94.

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Vaughan Williams L.J.

to this time permanent alimony for a guilty wife has not been ordered except with the consent of the husband, or under special circumstances." Thereupon Jessel M.R. says: "I am sorry to hear it. I am not giving a final opinion, but it appears to me that s. 32 was intended to give the Court a discretion which was to be exercised according to the circumstances of each case, and that it was not intended that a guilty wife should be turned out into the streets to starve." And then, when the Master of the Rolls came to deliver his judgment, he says this: "Now under the 32nd section the practice seems to have grown up of not allowing maintenance to the guilty wife unless a special case is shewn. I am not prepared to say on the present occasion that this is the correct rule. I am not going to lay down that it is not. I should require further consideration and argument before doing so; but it appears to me that the 32nd section of the Act has left an absolute discretion in the Court. I think there was a good reason for doing so. When a divorce could only be obtained by Act of Parliament, it was in practice only obtained by wealthy persons, because it was very expensive, and it might well be considered right that where a wealthy man obtained a divorce from a wife who had no means of subsistence, he should, as a condition of his being granted that divorce, be compelled to make some provision for her, so that she should not be allowed to starve." Then the Master of the Rolls goes on to state the grounds for the passing of the Divorce Act and to state his own inclination of opinion that, in the case of a wealthy gentleman obtaining a divorce, the Court, in acting under s. 32, ought to act on a rule somewhat similar to that established in the House of Lords under the old practice; but at the end of that passage he says: "I am only stating my present impression that the Court, under s. 32, has full discretion, and is under no obligation to require special circumstances to be shewn to entitle the guilty wife to some provision." Then he goes on to deal with the particular case before him, and he deals with it in such a way that it was not necessary to decide the point now before us, namely, whether there is a discretion vested in the Court to order a provision for a guilty

wife in the absence of special circumstances. But upon this point of discretion the Master of the Rolls said this: "Now considering the learned judge's acquaintance with all the facts and his great experience in these matters, we should be very slow indeed to interfere with his discretion, either as regards enlarging the time"—for an application by the wife for permanent maintenance—"or as regards the circumstances which in his opinion disentitled the wife on the merits to any allowance."

Then, coming to Lindley L.J.'s judgment, it is quite obvious that he refuses to give any sanction to what Mr. Inderwick states to have been the practice of the Court up to that time, for he says: "The question whether what we understand to be the ordinary practice in the Divorce Court is right or wrong is to be considered as left an open question; but I am not prepared to dissent from the conclusion of the President on the present occasion." That is to say, it is not right to hold that the Court has not, under the section, a full and absolute discretion, and that it must require special circumstances to be shewn before it can order a provision to be made for the guilty wife.

In this particular case there is no suggestion whatever of any misconduct on the part of the husband; but the learned judge is of opinion that what is proved is that the wife has no means of subsistence, and that she is unable to earn any. This, then, is not a case in which the guilty wife is able to earn her own living: it is a case in which, owing to the state of her health, she is unable to do so. Under the circumstances I think we ought not to interfere with the order of the learned judge, and that we ought to affirm and approve of it. It is entirely a matter for discretion, and we cannot hold that there is any rule of practice which says that no provision shall be made for the guilty wife unless there are special circumstances, such as misconduct on the part of the husband.

The appeal must be dismissed with costs.

MATHEW L.J. I am of the same opinion. Counsel for the appellant has been wholly unable to explain away the clear

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language of the section; and there is no such limitation to the discretion given to the Court as he suggests. The learned judge saw the wife, heard her evidence, and entertained no doubt that she was unable to support herself.

Appeal dismissed.

Solicitors: *Jaques & Co., for W. & E. W. Bullen; J. Sykes, for Pennington & Higson, Liverpool.*

G. I. F. C.

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1902, will be as follows:—

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In the Second Series,
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DESERTION—*Deed of Separation—Bar—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39).

If a wife, having cause of complaint, under the Summary Jurisdiction (Married Women) Act, 1895, against her husband on the ground of desertion, enters into a valid deed of separation, the effect is to put an end to any desertion theretofore existing.

Quære, per Sir F. Jeune P.: Whether a complaint, if made within six months after the deed, could properly be entertained. PIPER *v.* PIPER
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2. —— *Practice—Bankrupt Petitioner—Claim for Damages—Security for Costs.*

There is no settled practice in the Probate and Divorce Division that a petitioner, who is an undischarged bankrupt and who claims damages from the co-respondent, must give security for costs unless he withdraws the claim for damages. BLACKETT *v.* BLACKETT AND FRAIL - C. A. 170

3. —— *Practice—Costs—Co-respondent.*

Where, upon an application to make a co-respondent liable for the costs of a petition, the only proof of scienter was an admission by him that within a fortnight after he first committed

DIVORCE—*continued.*
adultery with the respondent he became aware that she was a married woman:—

Held, that the petitioner was entitled to an order for costs against the co-respondent. BILBY *v.* BILBY AND HARROP - - **Jeune Pres. 8**

4. —— *Practice—Costs—Wife's Costs—Co-respondent.*

Upon a husband's petition for dissolution of marriage, no verdict was recorded upon the first trial, the jury being unable to agree upon some of the issues. On the second trial the jury found that the respondent and co-respondent had committed adultery, and that the petitioner had also committed adultery, but that the respondent had condoned it. The Court refused to grant the petitioner a decree and dismissed his petition; but, upon the question raised as to costs:—

Held, that the wife was entitled to be paid by the petitioner her full costs of both trials; but

Held, further, that the petitioner was entitled to costs against the co-respondent in respect of the issue found against the latter, and that the order must cover the costs of that issue on both the trials.

Morgan v. *Morgan and Porter*, (1869) L. R. 1 P. & M. 644, and *Grosvenor* v. *Grosvenor*, (1885) 34 W. R. 140, commented upon. WAUDBY *v.* WAUDBY AND BOWLAND - **Gorell Barnes J. 85**

5. —— *Settlements, Variation of—Matrimonial Causes Act*, 1859 (22 & 23 *Vict. c.* 61), *s.* 5—*Death of only Issue of Dissolved Marriage—Vested Interest devolving on Respondent—Remarriage of Respondent and Fresh Settlement thereon—Extinguishment of all Respondent's Interests, including the Derivative Interest.*

Under s. 5 of the Matrimonial Causes Act, 1859, the Court has power to make, in favour of a petitioner, orders affecting settled property, even though the child or children of the marriage which has been dissolved attained a vested interest in the property. BLOOD *v.* BLOOD
Gorell Barnes J. 78

6. —— *Settlements, Variation of—Petition by Guilty Party—Jurisdiction to entertain.*

Semble, the Court has power to entertain a petition for variation of settlements at the instance of the party through whose misconduct the marriage has been dissolved.

If a wife is in receipt of an allowance derived from funds settled by the husband, and if out of that allowance she keeps up their joint establishment, the husband is not entitled to a reduction of the wife's allowance after she has obtained a divorce by reason of his cruelty and adultery. WOOTTON-ISAACSON *v.* WOOTTON-ISAACSON
Gorell Barnes J. 146

7. —— *Settlements, Variation of—Vested Interest of Child—Respondent Husband next of Kin—Extinguishment of all Respondent's Life and Derivative Interest—Property settled—Matrimonial Causes Act*, 1859 (22 & 23 *Vict. c.* 61), *s.* 5—*Form of Order.*

The Court has jurisdiction under s. 5 of the Matrimonial Causes Act, 1859, to make, in favour of a petitioner, the wife, an order affecting settled property, even after a child of the dissolved marriage has attained a vested interest, by extinguishing all the rights, powers, and interests of

DIVORCE—*continued.*
the respondent, the husband, over the petitioner's settled fund, including any beneficial derivative interest as next of kin of his deceased child.

Crisp v. *Crisp*, (1872) L. R. 2 P. & M. 426, discussed.

Decision of Gorell Barnes J., [1902] P. 78, affirmed with a variation in the form of order. BLOOD *v.* BLOOD - - - **C. A. 190**

—— Permanent alimony—Maintenance of guilty wife - - - - - **270**
See HUSBAND AND WIFE. 1.

DOCK — Collision — Damage — Control by dock-master, his deputies or assistants **115**
See SHIPPING. 3.

—— Collision—Owner's improvements effected while in dock—Contribution - **17**
See SHIPPING. 6.

ECCLESIASTICAL LAW — *Jurisdiction — Clergy Discipline Act*, 1892 (55 & 56 *Vict. c.* 32), *ss.* 2, 3, 12—*Offence against Morality—Immoral Conduct—Canons* 71 *and* 109 *of* 1603—*Conduct unworthy of the Character of Minister of Religion.*

The nature and character of the immorality and immoral conduct within the Clergy Discipline Act, 1892, considered. SWEET *v.* YOUNG
Consist. Court of Rochester 37

EVIDENCE—Judgment, Action to set aside—Alleged fraud—Revocation of probate—Nature of evidence necessary to maintain action - - - - **130**
See RES JUDICATA.

—— Pedigree—Marriage—Administration suit
See PROBATE. 6. **233**

EXECUTION — Informal document — Witnesses dead—No attestation clause—Presumption - - - - - **205**
See PROBATE. 4.

—— Will—"In the presence" of witnesses **3**
See WILL. 1.

—— Will—Mistake—Inadvertence of solicitor—Words eliminated from probate - **234**
See PROBATE. 11.

—— Will—Presumption—No attestation clause—Witnesses dead - - - **205**
See PROBATE. 4.

—— Will—Several sheets of paper—Destruction of two—Effect—Revocation - **243**
See PROBATE. 12.

EXECUTOR—According to the tenor—Trustees—Direction for advancement and maintenance of children - - **188**
See PROBATE. 3.

—— Costs—Practice - - - **92**
See PROBATE. 1.

—— Simple direction to pay debts—Executor according to the tenor - - **114**
See WILL. 2.

FRAUD—Judgment, Action to set aside—Alleged fraud—Revocation of probate - **130**
See RES JUDICATA.

FRAUD—*continued.*
—— Probate—Revocation on ground of fraud—Staying proceedings—Res judicata 62
See PROBATE. 10.

GENERAL AVERAGE—Delay—Time freight
See INSURANCE, MARINE. 256

HUSBAND AND WIFE — *Maintenance—Divorce—Permanent Alimony — Maintenance of Guilty Wife—Special Circumstances—Conduct of Husband—Discretion of Court—Matrimonial Causes Act.* 1857 (20 & 21 *Vict. c.* 85), *s.* 32.

There is no rule of practice that a wife against whom a decree nisi for dissolution of marriage is pronounced must shew special circumstances to entitle her to an order under s. 32 of the Matrimonial Causes Act, 1857, that the decree shall not be made absolute except upon the condition of the husband securing a provision for her support. The Court has an absolute discretion vested in it by the section, to be exercised according to the circumstances of each case. Thus, it will order the husband to secure a provision for his guilty wife, even though his own conduct has been unimpeachable, if the wife is proved to be entirely without means of support and unable through ill-health to earn her own living.

Robertson v. *Robertson*, (1883) 8 P. D. 94, considered.

Decision of Gorell Barnes J. affirmed. ASHCROFT *v.* ASHCROFT AND ROBERTS - **C. A. 270**

2. —— *Maintenance—Permanent Maintenance—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 32—*Gross Sum—Payment to Petitioner.*

The Court ordered a gross sum of money to be paid to a petitioner by way of permanent maintenance. KIRK *v.* KIRK - **Gorell Barnes J. 145**

3. —— *Maintenance — Step-children — Liability to maintain—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39), *s.* 4.

A husband, who has been separated from his wife under an order made under the Summary Jurisdiction Act, 1895, by a Court of summary jurisdiction, is liable to be ordered to make his wife an allowance for the support of her children by a former marriage. HILL *v.* HILL **Div. Ct. 140**
—— Desertion—Deed of separation—Bar 198
See DESERTION. 1.
—— Desertion — Protection order — Husband's address unknown — Citation dispensed with - - - - - 104
See DESERTION. 2.
—— Probate—Practice—Married woman—"Proceeding instituted" - - 177
See PROBATE. 5.
—— Variation of settlements - **78, 146, 190**
See DIVORCE. 5—7.

IMMORALITY—Conduct unworthy of minister of religion - - - - 37
See ECCLESIASTICAL LAW.

INCORPORATION — Republication of will by codicil — Reference in will to future document - - - - 238
See PROBATE. 7.

INFANT—Maintenance — Step-children — Liability to maintain - - - 140
See HUSBAND AND WIFE. 3.

INSURANCE, MARINE—*General Average—Time Charter—Voyage Charter—Damage by Water in extinguishing Fire—Delay—Time Freight—Practice of Average Adjusters.*

By the practice of average adjusters, loss of time freight—resulting from detention under repair of general average damage—is not allowed in general average:—

Held, by Gorell Barnes J., that the practice is right, being in accordance with legal principles, for the loss of freight under a time charter caused by the delay is the result of an accidental circumstance peculiar to the shipowner and time charterer, and arising out of the contract between them, with which the cargo owner is not concerned, and where the loss of time is common to all the parties interested, and all suffer damage by the delay, the damage by loss of time may be considered proportionate to the interests, and, therefore, left out of consideration.

The words "all loss" in the definition of a general average sacrifice in *Birkley* v. *Presgrave*, (1801) 1 East, 220, at p. 228; 6 R. R. at p. 263, explained. THE "LEITRIM" **Gorell Barnes J. 256**

INTERVENER—Probate action—Married woman—"Proceeding instituted" - 177
See PROBATE. 5.

INTESTACY—Will—Several sheets of paper—Destruction of two—Effect—Revocation
See PROBATE. 12. 243

IRREGULARITY—Misdescription of plaintiff—Writ—"Co-partners"—"Owners" 150
See SHIPPING. 9.

JUDGMENT—Action to set aside—Alleged fraud—Revocation of probate - - 130
See RES JUDICATA.

JURISDICTION — Immoral conduct — Conduct unworthy of the character of minister of religion - - - - 37
See ECCLESIASTICAL LAW.
—— Nullity suit—Matrimonial residence—Jurisdiction - - - - 143
See DIVORCE. 1.
—— Settlements, Variation of—Petition by guilty party—Jurisdiction to entertain - 146
See DIVORCE. 6.
—— Summary Jurisdiction (Married Women) Act—Step-children—Liability to maintain - - - - - 140
See HUSBAND AND WIFE. 3.

LIFEBOAT—Salvage—Reward - - 123
See SHIPPING. 12.

LIMITATION OF LIABILITY—Collision—Bailment—Loss of chattel by negligence of wrongdoer - - - - 42
See SHIPPING. 4.

LONDON — Collision — Compulsory pilotage—Exemption—"Constant trader" - 216
See SHIPPING. 2.

MAINTENANCE—Guilty wife — Divorce—Permanent alimony - - - 270
See HUSBAND AND WIFE. 1.

—— Permanent maintenance—Gross sum—Payment to petitioner - - - 145
See HUSBAND AND WIFE. 2.

—— Step-children—Liability to maintain 140
See HUSBAND AND WIFE. 3.

MARRIAGE—Administration suit—Pedigree—Evidence - - - - 233
See PROBATE. 6.

MARRIED WOMAN.
See under HUSBAND AND WIFE.

MATRIMONIAL CAUSES—Divorce—Permanent alimony—Maintenance of guilty wife
See HUSBAND AND WIFE. 1. 270

—— Protection order — Husband's address unknown—Citation dispensed with 104
See DESERTION. 2.

—— Settlements, Variation of—Death of only issue of dissolved marriage—Vested interest—Remarriage - - 78
See DIVORCE. 5.

—— Settlements, Variation of — Matrimonial Causes Act - - - - 190
See DIVORCE. 7.

MAXIM—"Omnia præsumuntur rite esse acta"
See PROBATE. 4. 205

MERCHANT SHIPPING.
See under SHIPPING.

MISDESCRIPTION—Of plaintiff — Admiralty—Practice—Parties - - - 150
See SHIPPING. 9.

MISTAKE — Will — Inadvertence of solicitor—Words eliminated from probate - 234
See PROBATE. 11.

"MONEY"—"The rest of my money"—Other property—Will—Construction - 106
See WILL. 3.

NEGLIGENCE—Action in rem—Damage—Putting out to sea to avoid collision—Loss of anchor and chain - - 25
See SHIPPING. 1.

—— Collision—Bailment — Loss of chattel by negligence of wrongdoer - - 42
See SHIPPING. 4.

—— Collision—Contributory negligence - 208
See SHIPPING. 5.

NULLITY—Matrimonial residence—Nullity suit—Jurisdiction - - - 143
See DIVORCE. 1.

"OWNER" — Compulsory pilotage — Pilotage certificate of master - - 10
See SHIPPING. 8.

—— Writ — Misdescription of plaintiff — Irregularity - - - - 150
See SHIPPING. 9.

PARTIES—Admiralty—Practice—Action in rem—Writ—"Co-partners"—"Owners"—Misdescription of plaintiff - 150
See SHIPPING. 9.

PEDIGREE—Evidence—Marriage—Administration suit - - - - 233
See PROBATE. 6.

PILOTAGE—Compulsory—Pilotage certificate of master—"Owner" - - - 10
See SHIPPING. 8.

—— Exemption — Compulsory pilotage—"Constant trader" - - - 216
See SHIPPING. 2.

POWER OF APPOINTMENT—*Exercise by Will—Subsequent Will—No Clause of Revocation—No Reference to Power—"Give, Devise, Bequeath, and Appoint"—Power held to be exercised—First Will excluded from Probate.*

Where a testator, having made a will reciting a power of appointment and exercising or purporting to exercise that power, made a subsequent will, which contained no clause of revocation and no reference to the power, but by which he purported to "give, devise, bequeath, and appoint" all his real and personal estate:—

Held, that the word "appoint" was, under the circumstances, a sufficient exercise of the power, and that the second will, by implication, revoked the first.

The principle of the decision in *In re Mayhew, Spencer* v. *Cutbush*, [1901] 1 Ch. 677, followed. KENT *v.* KENT - - - Jeune Pres. 108

PRACTICE—Divorce.
See Cases under DIVORCE.

—— Parties—Admiralty—Practice—Action in rem—Writ—"Co-partners"—"Owners"—Misdescription of plaintiff - 150
See SHIPPING. 9.

—— Probate.
See Cases under PROBATE.

—— Staying proceedings—Judgment, Action to set aside—Alleged fraud—Revocation of probate - - - - 130
See RES JUDICATA.

PRESUMPTION—"Omnia præsumuntur rite esse acta" — Will — Execution — Witnesses dead—No attestation clause - 205
See PROBATE. 4.

PROBATE—*Costs—Executors—Practice.*

Executors, who are also residuary legatees, are in the same position, as to costs, as any other party who unsuccessfully propounds a will.

Where executors, who were also named as residuary legatees, had ample opportunities of forming an opinion as to the testamentary capacity of the deceased, and, acting upon their opinion, propounded a will or wills, which, in the result, were pronounced against, after verdict of a jury, on the ground of testamentary incapacity and want of knowledge and approval of the contents:—

Held, that not only was this a case in which their costs should not be allowed out of the estate, but that, following the general rule that costs follow the event, they should pay the costs of the defendant; but not of any of the parties cited, whose interests were practically identical with those of the defendant.

Boughton v. *Knight*, (1873) L. R. 3 P. & M. 64, distinguished. TWIST *v.* TYE
Gorell Barnes J. 92

PROBATE—*continued.*

2. —— *Costs—Probate Suit.*

Where a principal beneficiary takes instructions himself and causes a will to be prepared by a solicitor upon those instructions, but the solicitor does not see the testator, the circumstances so far invite inquiry as to justify the Court in refusing to condemn in costs a party opposing probate of the will. AYLWIN *v.* AYLWIN
Jeune Pres. 203

3. —— *Executors according to the Tenor—Trustees—Direction for Advancement and Maintenance of Children.*

A testator by his will directed the payment of his debts and funeral and testamentary expenses by his "executors hereinafter named," but failed to name any persons as executors. The will contained certain specific legacies and an expression of the testator's wishes as to the education and advancement of certain of his children, the cost of such education and advancement to be taken out of their several estates, and the remainder to be invested in freehold ground rents. The will proceeded to appoint the testator's widow and two of his sons as "trustees," gave certain bequests to the latter "for their services," and disposed of the residue of the testator's property:—

Held, that the trustees were executors according to the tenor, and entitled to probate. IN THE GOODS OF KIRBY - - **Jeune Pres. 188**

4. —— *Informal Document — Execution — Witnesses Dead—No Attestation Clause—No Evidence of Handwriting of one Witness—Presumption: "Omnia præsumuntur rite esse acta."*

The Court (Sir F. H. Jeune P.) extended the presumption of law—"Omnia præsumuntur rite esse acta"—to the case of an informal holograph document containing no attestation clause whatever, and in regard to which there was no evidence to prove the handwriting of one of the persons (both of whom were dead) whose names appeared near the signature of the testatrix at the foot or end of the document. IN THE GOODS OF PEVERETT - - - **Jeune Pres. 205**

5. —— *Intervener—Probate Action—Married Woman — Practice — "Proceeding instituted"—Independent Interest—Separate Estate—Restraint on Anticipation—Costs of opposite Party—Form of Order—Rules of Supreme Court*, 1883, *Order XII., r.* 23—*Probate Court Rules*, 1862 (*Contentious Business*), *r.* 6—*Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *s.* 2.

A summons by a married woman under Rules of Supreme Court, 1883, Order XII., r. 23, and Probate Court Rules, 1862, r. 6, for leave to intervene in a pending probate action for the purpose of asserting her independent interest in the subject-matter, is a "proceeding instituted" by her within s. 2 of the Married Women's Property Act, 1893, and therefore the Court has jurisdiction to order, if it thinks fit, the costs of the action, as from the date of the summons to intervene, to be paid out of her separate property, including property which is subject to a restraint on anticipatiou.

The fact that the married woman may have obtained an order giving her leave to intervene in the action "as a plaintiff," followed by a delivery to the defendant of a pleading whereby she "adopts the pleadings of the plaintiff," does not the less render her intervention a "proceeding instituted" by her within the section.

Order of Sir F. Jeune P. affirmed, with a variation. CRICKITT *v.* CRICKITT. (CRICKITT INTERVENING) - - - - **C. A. 177**

6. —— *Marriage—Pedigree—Evidence—Administration Suit.*

The Court, in the absence of any official record, accepted, as sufficient primâ facie evidence of a marriage of the parents of an intestate, a statement contained in an extract from a Scottish marriage register of the year 1868 (the bridegroom being the intestate's brother), in which, under the heading "Name, surname, and rank or profession of father," appeared the names and description of both parents of the bridegroom. WIGLEY *v.* SOLICITOR TO THE TREASURY
Jeune Pres. 233

7. —— *Republication of Will by Codicil—Reference in Will to future Document—Incorporation.*

The testatrix, by a will made in 1895, gave to M. R. S., during her life for her own absolute use and benefit, all her furniture, books, plate, and personal effects, and, after the death of the said M. R. S., the testatrix directed that her trustees should give to such of her friends as she (the testatrix) might designate in a book or memorandum, to be found with her will, "the different articles specified for such friends in such book or memorandum. . . . ." The will also declared that M. R. S. was to have absolute power to dispose of any articles not specifically disposed of by the testatrix:—

Held, that as the "book or memorandum" was referred to in the will as a future document, the codicil, which confirmed the will, could thereby only be taken to speak of the book as a future document, even although it was in fact written before the date of the codicil:

Held, therefore, that the book was not incorporated and could not be included in the probate. IN THE GOODS OF SMART - **Gorell Barnes J. 238**

8. —— *Soldier's Will—Wills Act* (1 *Vict. c.* 26), *s.* 11.

Mobilization may be fairly taken as a commencement of that which, in Roman law, was understood by the words "in expeditione." If the order to mobilize has been received, although any particular member of the force may himself have taken no step under it, yet the order itself so affects his position, as a unit of the whole force, as to place him "in expeditione."

On September 7, 1899, a battalion stationed in India was "warned" for service, and two days later was "ordered to mobilize" for active service in South Africa, and embarked on September 19, 1899. The deceased, a private soldier in that battalion, wrote, between September 8 and September 19, an undated letter, which was received by the plaintiff in England on October 2, 1899. The writer died of fever during the siege of Ladysmith on February 9, 1900.

The letter contained (inter alia) the expressions: "If you have a letter to say that I am killed, then the lot is for you." . . . . "You will

PROBATE—*continued.*

receive the lot if I am killed in action, for I shall make out my will in your favour."

No other document in the nature of a will was ever received or discovered, and the father of the deceased, the latter being unmarried, took out letters of administration.

The plaintiff having propounded the letter as the will of the deceased soldier, claimed revocation of the grant of administration:—

Held, that the document was testamentary, and that it was a soldier's will within the meaning of s. 11 of the Wills Act. GATTWARD *v.* KNEE - - - - **Jeune Pres. 99**

9. —— *Soldier's Will.*

Where the deceased, who was a man of education and had risen from the ranks to the position of quarter-master and hon. lieutenant in the Grenadier Guards, had sailed with his wife to Gibraltar, and was afterwards seen off by her from that place under orders for South Africa, the wife, it appeared, wrote to him afterwards, telling him about the will of a brother officer, whose affairs, she said, had been left in disorder. He answered that letter under date March 22, 1900, saying, "As regards my will, I am sorry I have not made one . . . . I leave everything to you, as, should the boy require anything, you will provide for him." The wife received this letter on April 16, 1900; and she subsequently received other letters of later dates. The widow, who is now in receipt of a pension from the War Office, propounded the letter of March 22, 1900, as the will of the deceased. The defendant, who was their son, aged twelve, appeared by his guardian ad litem and opposed.

Gorell Barnes J., having been informed of the President's decision in *Gattward* v. *Knee*, [1902] P. 99, followed it and pronounced for the document in question. Costs as between solicitor and client out of the estate. MAY *v.* MAY

Gorell Barnes J. 103, n.

10. —— *Staying Proceedings—Practice—Res Judicata—Action for Revocation on Ground of Fraud—Person charged with Fraud not a Party to former Proceedings.*

If any person who is interested, directly or indirectly, in the establishment of a testamentary document is guilty of fraud in putting forward that document for probate, this fraud affects the whole litigation. Where, therefore, the plaintiff, in an action against executors, claimed, on the ground of fraud, to revoke a probate granted in solemn form, and the defendants moved to dismiss the action as res judicata, the Court refused to stay the proceedings, although it was not suggested that the executors, to whom probate had been granted, were cognizant of the alleged fraud, and although the person, against whom the plaintiff now made the charges, was not a party to the former suit. BIRCH *v.* BIRCH

Gorell Barnes J. 62

11. —— *Will—Mistake—Inadvertence of Solicitor—Opportunity for Reading Over—Due Execution—Want of Knowledge and Approval—Words eliminated from Probate.*

Where the solicitor who drew the will of the testatrix mistook the extent of her interest in certain landed estates, and the will was accordingly executed devising only her "undivided moiety of and in" the said estates, the Court, notwithstanding the fact that a draft of the will had been sent for her approval, and she had returned the said draft with certain alterations in other parts, found as a fact that she did not know and approve of the clause as drawn, and directed that the restrictive words should be eliminated from the probate. BRISCO *v.* BAILLIE HAMILTON - - - **Jeune Pres. 234**

12. —— *Will—Several Sheets of Paper—Destruction of two—Effect—Revocation—Substitution of other Sheets—Execution—Signatures—Clause of Revocation—Intention—Intestacy.*

A testator left a testamentary document in the form of a will, which was apparently duly executed, and consisted of five sheets of paper fastened together.

The fact was, however, that the first two sheets were executed in the year following the execution of the last three, and were not part of the document as originally executed. There was no evidence as to the contents of the two that were missing. The two that had been substituted contained the ordinary commencement, followed by a revocation clause, and were signed by the testator in the presence of the same two witnesses who had before attested the others:—

Held, that the destruction of the first two sheets of the original will effected a revocation of the three that remained:

Held, further, that the signing by the testator of the two substituted sheets in the presence of the witnesses was not intended to make them operate as his will, and that the result was an intestacy. LEONARD *v.* LEONARD

Gorell Barnes J. 243

13. —— *Will torn in pieces and pasted together again—Persons not sui juris interested in Intestacy—Practice—Probate, on Motion, to Executrix.*

The Court, upon motion by the sole executrix, granted probate of a will which had been torn up and afterwards pasted together again, notwithstanding the fact that the persons interested under an intestacy were not sui juris and no guardian ad litem had been appointed by the Court to represent them. IN THE GOODS OF BRASSINGTON - - - **Gorell Barnes J. 1**

14. —— *Wills—Codicils—Revocation—Revival.*

In 1895 the testator executed a will and two codicils. In 1898 the same solicitor, who had prepared that will and the second codicil thereto, drew another will, which revoked "all wills, codicils, and testamentary dispositions" theretofore made by the testator. The three documents of 1895 were destroyed immediately after the execution of the will of 1898. In 1899 he executed a codicil which was expressly declared to be a codicil to the will of 1898, and which made some slight alterations in the disposition under that will of a portion of the residue. In 1900 a solicitor, who had prepared the first of the codicils in 1895, drew for the testator a codicil, described as a codicil to the will of the 10th day of January, 1895, and concluding with a confirmation of the said will "as altered by the

PROBATE—*continued.*
codicils thereto." This last codicil made certain charitable bequests.

After the testator's death, in 1901, the will of 1898 and the two codicils of 1899 and 1900 were the only testamentary documents found among his papers.

Upon motion by the executors of the will of 1898 (three of whom were also named as executors in the will of 1895):—

The Court (Gorell Barnes J.) granted probate of the will of 1898 and codicils of 1899 and 1900, omitting from the last document the words of reference to the will of 1895.

Rogers v. *Goodenough*, (1862) 2 Sw. & Tr. 342, followed.

In the Goods of Chilcott, [1897] P. 223, distinguished. IN THE GOODS OF READE
Gorell Barnes J. 75

—— Revocation of probate—Judgment, Action to set aside—Alleged fraud - 130
See RES JUDICATA.

PROBATE COURT RULES, 1862, r. 6—*Contentious Business* - - - 177
See PROBATE. 5.

PROTECTION ORDER—Married woman—Husband's address unknown—Citation dispensed with - - - 104
See DESERTION. 2.

PUBLIC POLICY — Salvage — Agreement by owners to render mutual assistance 157
See SHIPPING. 11.

REPUBLICATION—Will by codicil—Reference in will to future document—Incorporation - - - - - 238
See PROBATE. 7.

RESIDENCE — Matrimonial — Nullity suit — Jurisdiction - - - 143
See DIVORCE. 1.

RESIDUE—Will—Construction—"The rest of my money"—Other property - 106
See WILL. 3.

RES JUDICATA—*Action to set aside Judgment—Alleged Fraud—Revocation of Probate—Nature of Evidence necessary to maintain Action—Motion to stay Proceedings.*

In order to maintain an action to set aside, on the ground of fraud, a judgment establishing a will and granting probate of it, the plaintiff must adduce evidence of facts discovered since the judgment which raise a reasonable probability of the success of the action.

If the plaintiff does not do this, the proceedings in the action will be stayed on the motion of the defendant.

Per Vaughan Williams L.J.: The evidence need not necessarily be of such a character that it would be evidence in the action. The question in each case is, whether the fact alleged to have been discovered is so evidenced and so material as to make it reasonably probable that the action will succeed. If it is, the action ought to be allowed to proceed, so that the plaintiff may have an opportunity of obtaining discovery in it.

Per Cozens-Hardy L.J.: Though in most

RES JUDICATA—*continued.*
cases a judgment obtained by fraud can be set aside only as against the person who committed or procured the fraud, this limitation does not apply to an action to set aside a judgment granting probate of a will, inasmuch as a will must be either good or bad against all the world,

Judgment of Gorell Barnes J., [1902] P. 62, refusing to stay proceedings in an action to set aside, on the ground of fraud, a judgment establishing a will, reversed, fresh evidence having been adduced upon the appeal. BIRCH *v.* BIRCH - - - - - C. A. 130

—— Probate—Revocation on ground of fraud—Staying proceedings - - 62
See PROBATE. 10.

REVIVAL—Wills—Codicils—Revocation 75
See PROBATE. 14.

REVOCATION—Power of appointment—"Give, devise, bequeath, and appoint" - 108
See POWER OF APPOINTMENT.

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SHIPPING—*Collision—Action in Rem—Damage—Negligence—Putting out to Sea to avoid Collision—Loss of Anchor and Chain—Consumption of Stores.*

Where the plaintiffs' vessel slipped, and put out to sea, to avoid collision with the defendants' vessel, which had been negligently allowed to drag down upon her and foul her chain :—

Held, by Sir F. H. Jeune P., that the plaintiffs were entitled, in an action in rem, to recover the expenses incurred, namely, the value of the anchor and chain lost, and of the coals and stores consumed. THE "PORT VICTORIA"

Jeune Pres. 25

2. —— *Collision — Compulsory Pilotage — Exemption—London District—"Constant Trader"—Pilotage Act*, 1825 (6 *Geo.* 4, *c.* 125), *s.* 59—*Order in Council, February* 18, 1854—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 603.

A British steamship company ran two lines, one from London to Antwerp and then on to America and back, the other from London to New Orleans direct, with liberty to call at Bermuda, and their vessels were employed on either line according to convenience. A new vessel belonging to the company had made one voyage from London viâ Antwerp to Mexican ports, and was proceeding in charge of a duly licensed Trinity House pilot, and carrying one passenger, on a second voyage for the same round, when she came into collision with the plaintiffs' vessel in the estuary of the Thames. The pilot of the vessel of the defendant company was found alone to blame :—

Held, by Gorell Barnes J., that the defendants were liable as their vessel was exempt from compulsory pilotage, being a "constant trader" between London and ports on the Continent north of Brest, within the meaning of the exemption in s. 59 of 6 Geo. 4, c. 125, supplemented by the Order in Council, February 18, 1854, and kept alive by s. 603 of the Merchant Shipping Act, 1894. THE "CAYO BONITO"

Gorell Barnes J. 216

3. —— *Collision—Damage—Control by Dock-master, his Deputies or Assistants — Harbours, Docks, and Piers Clauses Act*, 1847 (10 & 11 *Vict. c.* 27), *s.* 53—*Co-defendants—Costs.*

Under No. 2 of the by-laws, and Nos. 10 and 17 of the regulations of the London and India Docks Company, issued under the London and India Docks Amalgamation Act, 1900, which incorporates the Harbours, Docks, and Piers Clauses Act, 1847, the expression "dock-master" includes his duly authorized deputies and assistants, and vessels are to be moved by the persons in charge under the direction of the dock-master, who may also give any other directions.

The plaintiffs' steam vessel was entering the defendants' dock under the direction of the dock-master, who was standing on one of the pier-heads. At the same time an official of the dock company (a lock foreman in uniform) standing on the other pier ordered a ketch, belonging to the other defendants, and lying within the prescribed limits of the authority of the dock company, to swing round for the purpose of entering the dock. By a second (and as it was found improper) order, the lock foreman directed some

SHIPPING—*continued.*

barges, to which the ketch was fast, also to swing, with the result that the ketch, being unable to check herself by the rope which was fast to the barges, without any negligence in those in charge of her, came into collision with the plaintiffs' steam vessel. The judge of the City of London Court pronounced in favour of the plaintiffs against both defendants, on the ground of the improper order of the official of the dock company, and the absence of any statutory exemption relieving the owners of the ketch from liability for the tort committed :—

Held, by the Divisional Court (Sir F. H. Jeune P. and Gorell Barnes J.), that the defendant dock company was alone liable for the damage sustained by the plaintiffs' vessel, as the lock foreman was a deputy or assistant of the dock-master within the meaning of rule 2 of the by-laws, whose orders those in charge of the ketch were bound, under the provisions of the Harbours, Docks, and Piers Clauses Act, to obey, and as the relationship of master and servant did not exist between the dock official and the owners of the ketch, they were not responsible for his negligent order :

Held, also—following *The River Lagan*, (1888) 6 Asp. M. L. C. 281—that the plaintiffs acted reasonably in joining both parties as defendants, and that, as the defendant dock company threw the blame on the other defendants, but were themselves alone to blame, the plaintiffs' costs against both defendants, and the costs of the owners of the ketch, both in the Court below and on appeal, must fall on the dock company. THE "MYSTERY" - - - - **Div. Ct. 115**

4. —— *Collision—Limitation of Liability—Bailment—Loss of Chattel by Negligence of Wrong-doer—Claim by Bailee against Fund in Court—Possessory Title as against Wrongdoer—Measure of Damage.*

In an action against a stranger for loss of goods caused by his negligence, the bailee in possession can recover the value of the goods, although he would have had a good answer to an action by the bailor for damages for the loss of the thing bailed.

Claridge v. *South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422, overruled. THE "WINKFIELD" - - - - - **C. A. 42**

5. —— *Collision — Negligence — Contributory Negligence—Thames By-laws*, 1898, *art.* 47.

The plaintiffs' steam vessel, proceeding down the river Thames against the tide, neglected—in breach of art. 47 of the Thames By-laws—to wait before rounding Blackwall Point "until any other vessels rounding the point with the tide (had) passed clear," and came into collision with the defendants' steam vessel which had come up the river, and was, at the material time, in process of turning preparatory to entering the West India Docks.

The defendants' vessel was found to blame for negligently failing to execute the manœuvre of turning with due regard to the passing traffic, and the plaintiffs' vessel was also found to blame for hampering the manœuvre of the other vessel. The plaintiffs appealed :—

Held, by the Court of Appeal (Collins M. R.,

Mathew and Cozens-Hardy L.JJ.), affirming the decision of Sir F. H Jeune P., [1901] P. 127, that the plaintiffs' vessel was to blame, for, through the breach of art. 47, she had brought herself into a position in which she placed the defendants' vessel in a difficulty, and threw upon those in charge of that vessel the obligation of exercising more than ordinary care.

The Margaret (*Cayzer* v. *Carron Co.*), (1884) 9 App. Cas. 873, distinguished. THE "OVINGDEAN GRANGE" - - - - C. A. 208

6. —— *Collision—Ship Docked for Repair of Damage—Owner's Improvements effected while in Dock—Apportionment of Dock Charges and Expenses—Contribution.*

In order to repair the damage sustained in a collision for which the defendants were liable, the plaintiffs' vessel was dry-docked, and the plaintiffs (without causing delay or increase of dock expenses) took advantage of the opportunity to fit her with bilge keels:—

Held, by Sir F. H. Jeune P., applying the principle laid down in *The Ruabon*, [1900] A. C. 6, that, even though the plaintiffs had derived material benefit, the defendant wrongdoers were not entitled to any contribution from them towards the expenses of, and consequent upon, the dry-docking. THE "ACANTHUS" Jeune Pres. 17

7. —— *Collision—Sound Signals for Vessels in sight of one another—"Course authorized or required by these Rules"—Regulations for Preventing Collisions at Sea*, 1897, *art.* 28.

The direction in art. 28 of the Regulations for Preventing Collisions at Sea 1897, that "when vessels are in sight of one another, a steam vessel under way, in taking any course authorized or required by these rules, shall indicate that course by the (specified) signals on her whistle or syren," is not only imperative, but the word "authorized" includes any course which, for the safety of the vessels, good seamanship requires to be taken with reference to the other vessel then in sight. THE "USKMOOR" Jeune Pres. 250

8. —— *Pilotage—Compulsory Pilotage—Pilotage Certificate of Master—"Owner"—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 599.

A certificate issued, and annually renewed, by a pilotage authority, under ss. 340, 341 of the Merchant Shipping Act, 1854 (now embodied in ss. 599 of the Merchant Shipping Act, 1894), recited that (name) was master of the ship (named) "whereof (name of firm) are the owners," and stated that it was granted "to enable him to pilot the said ship or any other ship or ships belonging to the same owners."

The named firm never owned the named ship, or the ship to which the master was subsequently transferred, though the firm managed both ships as belonging to the same line of ocean steamers. Individual members of the named firm held shares, along with other parties, in the named ship, and one of those members was registered as managing owner of the named ship, and of the ship to which the master was transferred, of which latter ship that member was registered as holder of all the

shares, though in fact he was only trustee for beneficial owners:—

Held, by Sir F. H. Jeune P., that the certificate was invalid by reason of a mis-statement as to the ownership, for it only enabled the holder to pilot the named ship, or any other ship belonging to the same owners—that is, the named firm; but the named firm were not owners of the named ship at the date of the original issue of the certificate, or of either vessel at the date of its last renewal, or at the date of a collision between the ship to which the master was transferred and the plaintiffs' vessel.

Semble, that to satisfy the words "the ship of which he is master or mate, or any one or more ships belonging to the same owner as that ship" in s. 599 of the Merchant Shipping Act, 1894, the same owners must, at the material times, have held the whole of the shares in the vessel in respect of which the certificate was originally granted as well as hold the whole of the shares in the vessel to which the master is transferred.

The Earl of Auckland, (1861) Lush. 164, 387, followed. THE "BRISTOL CITY" Jeune Pres. 10

9. —— *Practice—Parties—Action in Rem—Writ—"Co-partners"—"Owners"—Misdescription of Plaintiff—Rules of Supreme Court*, 1883, *Order* XLVIII. *A, r.* 1—*Irregularity—Fresh Step—Order* LXX., *rr.* 1, 2.

In an Admiralty action in rem for damage to cargo, the writ was issued in the name of a firm, and indorsed "The plaintiffs, as owners of goods laden on board" the carrying ship, claim compensation. The owners of the carrying ship appeared as defendants, gave bail, and, on their demand for particulars of names and addresses, the plaintiffs gave the name of a single individual residing in Paris, trading under the firm name at a London address. The defendants applied for security for costs, and, on this application being refused, moved to set aside the writ on the ground that under Order XLVIII. A, r. 1, the firm in the name of which the writ is issued must consist of two or more persons:—

Held, by Sir F. H. Jeune P., that, as the indorsement on the writ stated that the plaintiffs sued as "owners" of the cargo, the practice in Admiralty would have been satisfied if the word "owners" had appeared on the face of the writ. The mistake was, therefore, a mere "irregularity" which could be cured by leave to amend under Order LXX., r. 1, and, further, that as the defendants had, by applying for security for costs, taken a fresh step after knowledge of the irregularity, they were precluded by rule 2 of the same order from taking advantage of the irregularity.

The Admiralty practice as to the title in an action in rem for damage to cargo is not abrogated by the rules of procedure under the Judicature Acts. THE "ASSUNTA" - Jeune Pres. 150

10. —— *Salvage — Apportionment — Classification of Salvors—Special Awards—Non-navigating Portion of the Crew—Horsemen.*

A large steamer crossing the Atlantic with passengers and cargo, and a considerable number of horses and cattle, fell in, during bad weather, with a dismasted barque. After her crew had been taken off, and the wreckage cut away, the

SHIPPING—*continued.*

barque was towed to the Azores. The owners of the barque settled the salvage claim by payment to the owners of the steamer of the sum of 8250*l.*

In an action for apportionment:—

Held, by Gorell Barnes J., that the owners of the salving steamer, who had incurred expenses amounting to 2000*l.*, were entitled to 6175*l.* and the master to 500*l.*, with special awards of 150*l.*, according to rating, to those of the officers and crew who had effected the transfer of the crew of the barque, 300*l.*, according to rating, to those engaged in cutting away the wreckage, 25*l.* to the boat's crew employed during that service, and 75*l.*, according to rating, to the boat's crew engaged in passing ropes, leaving 1025*l.* to be divided amongst the whole crew, but the non-navigating portion (surgeon, purser, cooks, stewards, and stewardess) to share as if rated at one-third of their actual rating, and (distinguishing *The Cariolanus*, (1890) 15 P. D. 103) the horsemen and their foreman—who were in the employ and pay of the owners of the salving steamer, and, having stations assigned to them at the boats, were liable to be called upon to perform duties—to share at one-third of the rating of an A.B. THE "MINNEAPOLIS" - Gorell Barnes J. 30

11. —— *Salvage—Associated Insurance Clubs—Agreement by Owners to render Mutual Assistance—Arbitration—Notice to Masters—Rights of Crew.*

An agreement between the associations in which fishing vessels are insured, that the amount of remuneration payable for salvage services rendered by one of the insured vessels to another shall be settled by the committees of the two associations concerned, is not binding on the master and crew of the salving vessel, who are not parties, and have not assented, thereto.

Quære, whether such an agreement would not, in respect of the members of the crew, even if assented to by them, be against public policy. THE "MARGERY" - - - Div. Ct. 157

12. —— *Salvage—Reward—Tug engaged by salving Tug—Lifeboat Tug towing salved Vessel—Right of Lifeboat Crew to Participate.*

A steam tug, employed by the National Lifeboat Institution solely for the purpose of towing a lifeboat of that institution, went out with the lifeboat in tow to the assistance of a disabled steam vessel, and, after lying by all night, made fast ahead of the steam vessel and towed her, whilst the lifeboat (with her crew) was towed astern of the steam vessel. Subsequently the services of a second tug were accepted by the master of the steam vessel, and the master of that tug insisted, in spite of the remonstrance of the master of the steam vessel, in taking the services of a third tug, which was made fast ahead of the second tug. The steam vessel was successfully towed to a place of safety.

In an action of salvage it was admitted by the owners of the salved vessel that services were rendered by the two first tugs; but they denied the right of the coxswain and crew of the lifeboat, and of the owners, master, and crew of the third tug, to any award:—

Held, by Gorell Barnes J., that all the plaintiffs were entitled to salvage, for the first tug

SHIPPING—*continued.*

could not go out without taking the lifeboat with her, and, therefore, for salvage purposes, the crew of the lifeboat were to be regarded as if they formed part of the crew of the tug, though with a more moderate reward. Secondly, the owners, master, and crew of the third tug were to be regarded as salvors, for though the services of that tug were refused by the master of the salved vessel, and, as it turned out, were not in fact required, that tug made fast at the request of the second tug at a time when it was reasonably prudent and necessary for the salved vessel to have the services of a third tug. THE "AUGUSTE LEGEMBRE" - - Gorell Barnes J. 123

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WILL—*Execution*—"*In the Presence*" *of Witnesses*—*Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 9.

The expression "in the presence" in s. 9 of the Wills Act must be taken to mean actual visual presence.

Where a testatrix signed her will in a shop, and one witness, who saw her sign, attested it, but the other witness being at the time when the testatrix and first witness signed engaged at the other side of the shop with a person who stood between him and the testatrix, did not see them sign and did not know nor have the opportunity of knowing anything about what they had been engaged upon until after they had signed, when he was asked to be a witness:—

Held, that the testatrix did not sign "in the presence" of the second witness. BROWN *v.* SKIRROW - - - Gorell Barnes J. 3

2. —— *Simple Direction to pay Debts*—*Executor according to the Tenor.*

A simple direction to a certain person to pay debts of the testatrix, without any bequest to him and without specifically appointing him as trustee, may be enough to constitute him executor according to the tenor.

A testatrix, after bequeathing certain pecuniary legacies, desired J. G. to pay all her just debts, and then bequeathed to her niece, P. M., all her furniture and effects and all money she possessed:—

Held, that J. G. was thereby constituted executor according to the tenor. IN THE GOODS OF COOK - - - - Jeune Pres. 114

3. —— *Words*—"*The rest of my Money*"—*Other Property*—*Construction of Will.*

The meaning to be attached to the word "money" in construing a testamentary document is not absolute and technical, but must depend upon the context and surrounding circumstances.

Where a testator, by his will, left a specific legacy to his brother, and gave "the rest of my money" among six other persons, whom he named:—

Held, that the latter bequest covered all the residue of his estate. IN THE GOODS OF BRAMLEY Jeune Pres. 106

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